Reversed

Motion to dismiss
Submitted
4 Nov.

Filed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~849.~~ ~~500~~ 260

LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES, PLAINTIFFS IN ERROR,

vs.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED OCTOBER 10, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 849.

LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES, PLAINTIFFS IN ERROR,

vs.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

	Original.	Print.
Petition	2	2
Statement of account and mechanics' lien	22	13
Contract of Delaware Railway Construction Company	22	13
Resolution of Delaware Railway Construction Company as to contract	28	17
Resolution of Davenport and Saint Paul Railroad Company as to contract	29	18
Amended petition	43	28
Original notice to Davenport and Saint Paul Railroad Company	46	29
Answer of Davenport and Saint Paul Railroad Company	48	30
Reply of plaintiff	51	32
Report of referee	52	33
Decree of February 6, 1874	63	39
Supplemental petition	67	41
Record entry of original decree	68	42
Original notice served by publication, and affidavit of same	71	44
Execution	73	45
Sheriff's return	75	46
Motion for new trial as to Dennison	81	50
Security for costs	82	50
Answer of William Dennison	83	51
Judgment entry	84	52
Motion to strike out answer	85	52
Judgment entries	86	53
Amended answer	87	53
Petition of Meyer to become co-defendant	89	54
Petition to transfer cause	91	56
Bond to transfer cause	92	56
Motion for continuance	94	57
Judgment entry	96	58
Amended answer of Dennison	97	0
Affidavit as to matter of Meyer's petition	99	61

INDEX.

	Original.	Print.
Objections to transfer to United States court	101	62
Amendment to answer	102	62
Reply	103	63
Offer of Dennison and Meyer to give additional security	105	64
Decree	106	65
Notice of appeal	109	67
Stipulation	111	68
Motion to correct decree	112	68
Roll of costs and clerk's certificate	115	70
Testimony of H. C. Jackson	119	73
Testimony of F. B. Doolittle	121	74
Testimony of A. E. Martin	124	75
Testimony of Henry Harger	128	77
Testimony of F. B. Doolittle	129	78
Articles of incorporation of the Davenport and Saint Paul Railroad Company.	133	80
Mortgage of Davenport and Saint Paul Railroad Company	139	83
Mortgage of Davenport and Saint Paul Railroad Company	156	93
Amendment to mortgage	173	102
Amendment to mortgage	179	105
Amended decree	188	110
Clerk's certificate	193	112
Appellee's abstract of record in supreme court	195	113
Judgment	211	120
Opinion	213	120
Rehearing granted	229	125
Opinion	231	126
Motion for writ of error	234	127
Bond	236	128
Writ of error	238	128
Citation	239	129
Clerk's certificate	241	129

a Supreme court of Iowa.

Hon. James G. Day, *Ch. J.*
" J. H. Rothrock,
" J. M. Beck,
" Austin Adams,
" W'm H. Seevers, *Justices.*
E. J. Holmes, *Clerk.*

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson and William Dennison, trustees for certain bondholders of said railroad, The Davenport Railroad Construction Company, and Lucius Howard.

Be it remembered, that on the 21st day of Nov'r, 1875, the appellants in the above-entitled cause filed their printed abstract of record in the office of the clerk of this court, in words and figures following, to wit:

1 Be it remembered, that among the records and proceedings of the supreme court of Iowa appear the following records and proceedings, to wit:

STATE OF IOWA,
Delaware County, ss:

Pleas before the circuit court of the State of Iowa, for the county of Delaware, at a term begun and holden in the county of Delaware on the fourth Monday in January, 1874, on the third Monday in May, 1874, on the fourth Monday in January, 1875, and on the third Monday in May, 1875, before the Hon. Sylvester Bagg, sole judge of the circuit court in and for the ninth judicial district of the State of Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
against
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson and William Dennison, trustees for certain bondholders of said railroad, The Davenport Railway Construction Company, and Lucius Howard. — 1141. In equity.

Be it remembered, that heretofore, to wit, on the 15th day of January, A. D. 1874, a petition was filed in the circuit court in and for the county of Delaware and State of Iowa, in words and figures following, to wit:

2 *Petition in equity.*

In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson and William Dennison, trustees for certain bondholders of said railroad, The Davenport Railway Construction Company, and Lucius Howard.

Par. 1. The Delaware Railroad Construction Company, the plaintiff in this suit, is a corporation duly organized under the laws of the State of Iowa, and alleges that heretofore, to wit, on or about the sixth day of August, A. D. 1870, said plaintiff entered into a written contract, a copy of which is hereunto annexed and made a part hereof, whereby said plaintiff agreed with the defendant, the Davenport & S't Paul Railroad Company, a corporation duly organized under the laws of the State of Iowa, for the performance of certain work and the furnishing of certain materials for said railroad, which will more particularly appear from a copy of said contract contained in the statement for a mechanics' lien filed by said plaintiff in the office of the clerk of the district court of Delaware County, Iowa, and a copy of said statement, including a copy of said contract, is hereto annexed and made a part of this petition. By said contract said plaintiff agreed to grade said road from the south line to the north line of Delaware County, to do the grubbing, side-chopping, and clearing mentioned in said contract, to excavate the earth, solid and loose rock required for said portion of said road, and to furnish the timber and plank for bridges, the piles for foundations and bridges, and ties for said portion of said road.

3 Par. 2. Plaintiff alleges that, under the direction and supervision of the engineer of said railroad company, said plaintiff performed the work required in said contract, and in every respect complied with the terms and conditions thereof.

Par. 3. That plaintiff, under said *said* contract and the direction and supervision of said engineer, on the 29th day of September, A. D. 1870, commenced said work, and from that date to November 15, 1870, excavated eighteen hundred and five yards of earth and furnished and put twenty-two hundred and fifty-two feet of plank into culverts; that the same was estimated by the said engineer, November 15, 1870, as will more fully appear from his estimate No. 1, a copy of which is hereto annexed and made a part hereof.

Par. 4. That plaintiff, in like manner, from November 15 to December 15, 1870, excavated twenty thousand and ninety-one yards of earth, one hundred and twenty-three yards of solid rock, and nine hundred yards of loose rock; furnished and put into culverts twelve hundred and sixty-two feet of lumber, and grubbed and cleared four and fifty-eight hundredths acres of land, as will also appear from the estimate of said engineer, made December 15, 1870, a copy of which is marked estimate No. 2, is hereto annexed and made a part of this petition.

Par. 5. That in like manner said plaintiff, previous to January 10th, 1871, and from December 15, 1870, excavated eighteen thousand and one hundred and four yards of earth, four hundred and twelve yards of solid rock, and two hundred and thirty-nine yards of loose rock; furnished

and put into culverts one thousand five hundred and thirty-six feet of lumber, and grubbed and cleared thirty-four hundredths of an acre of land, and furnished one thousand and four ties, as will appear from the estimate of said engineer, made January 20, 1871, of which a copy, marked estimate No. 3, is annexed hereto and made a part hereof.

Par. 6. That in like manner, from January 10th, 1871, to Febru-
4 ary 1st, 1871, plaintiff excavated twenty-four hundred and forty-five yards of earth, seven hundred and thirty-eight yards of solid rock, and seven hundred and seventy yards of loose rock; furnished and put into culverts four hundred and sixty-four feet of lumber; grubbed and cleared one acre of land, and furnished twenty-three hundred and seventy-eight ties; all of which was included in the estimate of said engineer, made February 1st, 1871, a copy of which is hereto annexed, marked No. 4, and made a part hereof.

Par. 7. That in like manner, from February 1st to March 1st, 1871, plaintiff furnished thirty-seven hundred and twenty-eight ties, as shown by the estimate No. 5, a copy of which is hereto annexed and made a part of this petition.

Par. 8. That in like manner, from March 1, 1871, to April 1, 1871, plaintiff excavated ten thousand five hundred and fifty yards of earth, twelve hundred and seventy-four yards of solid rock, and three thousand eight hundred and fifty-nine yards of loose rock; furnished eleven thousand six hundred and eighty-six ties, and grubbed and cleared one acre of land; all of which appears from the estimate of said engineer, marked No. 6, a copy of which is hereto annexed and made a part hereof.

Par. 9. That in like manner, from April 1 to May 1, A. D. 1871, plaintiff excavated twenty-four thousand six hundred and eighty-four yards of earth, thirteen hundred and ninety-two yards of solid rock, and nineteen hundred and six yards of loose rock; furnished and put in twenty-seven hundred feet of lumber for culverts; furnished and delivered sixteen hundred and five ties, two thousand and ninety-five feet of piling, and grubbed and cleared five and thirty-five hundredths acres of land, being the estimate of said engineer, of which a copy, marked No. 7, is hereto annexed and made a part hereof.

Par. 10. That in like manner, from May 1 to June 1, 1871, plaintiff ex-
5 cavated thirty-three thousand and fifty-three yards of earth, eight hundred and fifty-three yards of solid rock, and two thousand three hundred and ninety-eight yards of loose rock; furnished and put in thirty-six hundred and fifty-six feet of lumber; furnished and delivered fifteen hundred and forty-two ties, two thousand and ninety-six feet of piles, and grubbed and cleared one and one-half acres of land, which is shown by estimate No. 8 of said engineer, of which a copy is hereto annexed and made a part of this petition.

Par. 11. That in like manner, from June 1 to July 10, 1871, plaintiff excavated twenty-eight thousand three hundred and twenty-five yards of earth, eleven hundred and forty-nine yards of solid rock, and thirteen hundred and forty-seven yards of loose rock; furnished and put into culverts three thousand three hundred and forty-one feet of lumber; furnished and delivered two thousand and sixty-six ties, nine hundred and fourteen feet of piling, and grubbed and cleared four acres of land, all of which is shown by estimate No. 9, a copy of which is hereunto annexed and made a part of this petition.

Par. 12. That in like manner, from July 10 to Aug. 7, 1871, plaintiff excavated ten thousand eight hundred and seventy-nine yards of earth, two hundred and sixty-four yards of solid rock, and fifty yards of loose

rock; furnished and put into culverts twenty-four hundred and thirty-six feet of lumber; furnished and delivered fifty ties, and grubbed and cleared six and ninety-seven hundredths acres of land, all of which was duly estimated by said engineer, a copy of whose estimate, marked No. 10, is hereto annexed and made a part hereof.

Par. 13. That in like manner, from August 7 to September 9, 1871, plaintiff excavated twenty-eight thousand nine hundred and fifty-seven yards of earth, three hundred and fifty-one yards of solid rock, and six hundred and eighty-five yards of loose rock; furnished twenty-three hundred and ninety-two feet of lumber, putting it into culverts;
6 furnished one hundred and fifty-seven ties; grubbed and cleared one and one-half acres of land; furnished and drove seven hundred and eighty feet of piling, over twenty feet long, and furnished and put into bridges twenty-four thousand five hundred and seventy-two feet of lumber, all estimated by said engineer, as will appear from his estimate No. 11, hereto annexed and made a part hereof.

Par. 14. That in like manner, from September 9 to October 4, 1871, plaintiff excavated twenty-six thousand five hundred and fifty-four yards of earth, seven hundred and seventy-five yards of solid rock, five hundred and nine yards of loose rock; furnished and put into bridges and culverts twenty-two thousand two hundred and ninety-six feet of lumber; furnished and delivered one hundred and three ties; grubbed and cleared two and forty-five hundredths acres of land; put in fifteen yards of riprap, at the rate of fifty cents per yard, and the same was reasonably worth $7.50, and furnished and drove three hundred feet of piling, each pile not over twenty feet, all of which is included in the estimate of said engineer marked No. 12, of which a copy is hereto annexed and made a part of this petition.

Par. 15. That in like manner, from October 4 to November 4, 1871, plaintiff excavated eighteen thousand seven hundred and thirty-three yards of earth, five hundred and sixty-three yards of solid rock, and two hundred and twenty-nine yards of loose rock; furnished and put into culverts seventeen hundred and eighty feet of lumber; grubbed and cleared one and one-fourth acres of land; furnished and drove eighty feet of piling, each pile not over twenty feet long, and thirty-two hundred and thirty-two feet of piling, each pile being over twenty feet long, and furnished and put into bridges seventy-four thousand five hundred and eighty-three feet of lumber, all of which, estimated by said engineer, is shown by his estimate No. 13, of which a copy is hereto annexed and made a part of this petition.

7 Par. 16. That in like manner, from November 4 to December 15, 1871, plaintiff excavated eleven thousand seven hundred and eighty-seven yards of earth, fifty yards of solid rock, and eighty-eight yards of loose rock; furnished and put into culverts fifteen hundred feet of lumber, grubbed and cleared one and seventy-five hundredths acres of land; furnished and drove nine hundred and thirty feet of piling, each pile over twenty feet long, and furnished for bridges sixteen thousand two hundred and eighty-seven feet of lumber, all estimated by said engineer Dec. 15, 1871, as will appear from his estimate No. 14, of which a copy is hereto annexed and made a part of this petition.

Par. 17. That in like manner, from the 15th day of December, 1871, to April 1, 1872, plaintiff excavated six thousand and eleven yards of earth, two hundred and ninety yards of solid rock, and two hundred and fifty yards of loose rock; furnished and delivered eighty thousand feet of bridging, twelve thousand three hundred and fifty-nine ties, sixteen hundred and thirty feet of piling, and furnished and drove twenty-

one hundred feet of piling, each pile being over twenty feet in length, all estimated by said engineer in his estimate No. 15, of which a copy is hereto annexed and made a part of this petition.

Par. 18. That in like manner, from April 1, 1872, to May 1, 1872, plaintiff excavated twenty-five thousand four hundred and fifty-seven yards of earth, seven hundred yards of solid rock, and twenty-eight hundred yards of loose rock; furnished and put into culverts twenty-six hundred and twenty-four feet of lumber, furnished and drove seven hundred feet of piling, furnished and delivered three thousand one hundred and thirty-eight ties, and grubbed and cleared four acres of land, all of which was duly estimated May 1, 1872, as will appear from estimate No. 16, of which a copy is hereto annexed and made a part of this petition.

Par. 19. That in like manner, during the month of May, 1872,
8 plaintiff excavated eighty-two thousand two hundred and twenty-nine yards of earth, nine hundred and eighty-three yards of solid rock, and twenty-one hundred and ninety-three yards of loose rock; furnished and put into culverts eighty-seven hundred and eighty feet of lumber, and furnished and delivered six thousand three hundred and twenty-eight ties, all of which were estimated by said engineer in estimate No. 17, of which a copy is hereto annexed and made a part of this petition.

Par. 20. That in like manner, from the month of May to July 1, 1872, plaintiff excavated thirty four thousand one hundred and forty-three yards of earth, seven hundred and fifty-eight yards of solid rock, and eight hundred and seventy-eight yards of loose rock; furnished fifty-nine hundred and thirty-nine ties, furnished and drove twelve hundred and sixty feet of piling, each pile being not over twenty feet, thirteen hundred and seventy-eight feet of piling, each pile being over twenty feet in length, and furnished and put into bridges eighty-one thousand three hundred and fifty-six feet of lumber, all of which was duly estimated by said engineer July 1, as shown by his estimate No. 18, of which a copy is hereto annexed and made a part of this petition.

Par. 21. That in like manner, after the 28th day of December, 1872, when said engineer made his final estimate, of which a copy marked No. 19 is hereto annexed and made a part of this petition, and after the entire line had been completed and accepted by said railroad company, other work was done by plaintiff and other materials furnished for said railroad company, at its special instance and request, to wit: Fifteen thousand five hundred and fifty-one feet of lumber, reasonably worth $15.50 per thousand, said lumber being required and ordered by said railroad company and furnished by plaintiff through Boon & Martin, subcontractors, having a contract with the plaintiff to furnish the same, and
9 the same was allowed, estimated, and approved by said engineer, as shown by supplimental estimate marked No. 20, a copy of which is hereunto annexed and made a part hereof; also one hundred and fifty-two ties, reasonably worth fifty-five cents each, and two hundred and thirty-five feet of lumber put into culverts, reasonably worth the sum of $35 per thousand; and of earth plaintiff excavated one thousand and eighty yards, reasonably worth the sum of twenty cents per yard, which was also allowed, estimated, and approved by said engineer, as appears by a supplimental estimate marked No. 21, of which a copy is hereto annexed and made a part of this petition.

Par. 22. That in like manner, previous to the 28th day of December, 1872, in addition to the work and materials mentioned in all of said estimates, except that marked No. 19, called the final estimate, plaintiff

excavated eighty-six thousand and fifty-one yards of earth, seventeen hundred and fifty yards of solid rock, and thirty two hundred and nine yards of loose rock; furnished and put into bridges and culverts one hundred and forty-two thousand three hundred and ninety-eight feet of lumber; furnished eleven thousand three hundred and seventy-eight ties and seventy yards of rip-rap work, said seventy yards being reasonably worth $80.50, and grubbed and cleared nine and ninety-four one-hundredths acres of land; all of which was ordered, allowed, and estimated by said engineer, being included in estimate No. 19, of which a copy is hereunto annexed and made a part of this petition, being called by said engineer final estimate.

Par. 23. And plaintiff says that a disagreement arose between the plaintiff and defendant in relation to the construction of said contract, which was arranged and settled by a subsequent agreement to strike out the following words, above the signature of H. Price, to wit: "All the money for the work hereinbefore specified to be paid by the citizens of Delaware County;" said agreement to strike out being evidenced by the resolutions and proceedings of the board of directors of
10 said railroad company, of which a copy is hereunto annexed and made a part of this petition, and by the proceedings and resolutions of the board of directors of plaintiff, a copy of which is hereunto annexed, marked "C," and made a part of this petition.

Par. 24. And plaintiff says that from the commencement of said work to the present time the entire amount received upon said contract in payment thereof is only the sum of one hundred and thirty-nine thousand one hundred and eighty-nine dollars and forty-six cents; that said amount is comprised in the following payments made at the times below stated, to wit, the following amounts were received at the times stated opposite the various sums and applied upon said contract in payment of the amount due as eighty per cent. of estimate No. 1 of said engineer:

Amount received November 21, 1870	$919 88
Amount received November 24, 1870	50 00
Amount received January 6, 1871	59 41

The following sums, received on or about the dates opposite the amounts, were applied in payment of the amount due as eighty per cent. of estimate No. 2 of said engineer:

Amount received December 19, 1870	$25 00
Amount received December 21, 1870	700 00
Amount received December 23, 1870	520 65
Amount received December 24, 1870	446 01
Amount received December 28, 1870	$829 00
Amount received December 29, 1870	1,186 04
Amount received December 30, 1870	55 00
Amount received December 31, 1870	110 00
Amount received January 6, 1871	33 39

The following sums, received on or about the dates set opposite thereto, were applied in payment of the amount due as 80 per cent. of estimate No. 3, of said engineer:

Amount received January 17, 1871	$160 21
Amount received January 19, 1871	136 67
Amount received January 20, 1871	224 82
11 Amount received January 21, 1871	97 92
Amount received January 23, 1871	590 34
Amount received January 28, 1871	320 77

Amount received February 15, 1871	243 62
Amount received February 16, 1871	13 53
Amount received February 24, 1871	420 16

The following sums, received on or about the dates set opposite thereto, were applied in payment of the amount due as 80 per cent. of estimate No. 4 of said engineer:

Amount received February 4, 1871	$1,355 20
Amount received February 9, 1871	277 71
Amount received February 11, 1871	443 49
Amount received February 14, 1871	38 80
Amount received February 15, 1871	237 73

The following sums, received on or about the dates set opposite thereto were applied in payment of the amount due as 80 per cent. of the estimate of said engineer marked No. 5:

Amount received March 8, 1871	$240 00
Amount received March 10, 1871	70 00
Amount received March 14, 1871	78 75
Amount received March 15, 1871	100 00
Amount received March 24, 1871	364 83
Amount received March 25, 1871	30 00
Amount received March 27, 1871	65 65

The following sums, received on or about the dates set opposite thereto, were applied in payment of the amount due as 80 per cent. of estimate of said engineer marked No. 6:

Amount received April 6, 1871	$151 14
Amount received April 8, 1871	818 00
Amount received April 11, 1871	301 52
Amount received April 15, 1871	100 00
Amount received April 18, 1871	20 00
Amount received April 19, 1871	553 16
12 Amount received April 20, 1871	25 00
Amount received April 22, 1871	1,491 58
Amount received April 25, 1871	826 52
Amount received April 26, 1871	184 80
Amount received April 29, 1871	167 09

The following sums, received on or about the dates set opposite thereto, were applied in payment of the amount due as 80 per cent. of estimate of said engineer marked No. 7:

Amount received May 19, 1871	$256 13
Amount received May 20, 1871	68 70
Amount received May 22, 1871	555 22
Amount received May 25, 1871	299 68
Amount received May 29, 1871	31 55
Amount received May 31, 1871	49 95

The following sums, received on or about the dates set opposite thereto, were applied in payment of the amount due as 80 per cent. of estimate of said engineer marked No. 8:

Amount received June 2, 1871	$490 30
Amount received June 7, 1871	632 45
Amount received June 10, 1871	1,275 47
Amount received June 24, 1871	333 62
Amount received June 29, 1871	524 55
Amount received July 1, 1871	1,884 31
Amount received July 4, 1871	259 12

Amount received July 5, 1871 ..... 2,152 17

The following sums, received on or about the dates set opposite thereto, were applied in payment of the amount due as 80 per cent. of estimate of said engineer marked No. 9:

Amount received July 10, 1871		$290 96
Amount received July 15, 1871		411 79
Amount received July 19, 1871		294 67
Amount received July 21, 1871		582 33
	Amount received July 26, 1871	431 97
13	Amount received July 28, 1871	449 15
	Amount received July 29, 1871	299 24
Amount received August 5, 1871		100 00
Amount received August 22, 1871		123 68
Amount received August 24, 1871		72 00
Amount received August 27, 1871		57 15
Amount received September 5, 1871		50 00
Amount received September 7, 1871		369 56

The following sums received on or about the dates set opposite thereto were applied in payment of the amount due as 80 per cent. of estimate of said engineer marked No. 10:

Amount received August 12, 1871	$125 00
Amount received August 15, 1871	22 50
Amount received August 17, 1871	165 85
Amount received August 21, 1871	1,535 91
Amount received August 22, 1871	291 26

The following sums received on or about the dates set opposite thereto were applied in payment of the amount due as 80 per cent. of estimate of said engineer marked No. 11:

Amount received September 9, 1871	$175 00
Amount received September 19, 1871	578 55
Amount received September 26, 1871	56 70
Amount received September 27, 1871	410 73
Amount received September 28, 1871	203 30
Amount received September 30, 1871	1,006 29

The following sums received on or about the dates set opposite thereto were applied in payment of the amount due as 80 per cent. of estimate of said engineer marked No. 12:

Amount received October 13, 1871		$166 69
Amount received October 20, 1871		342 55
Amount received October 31, 1871		1,073 61
Amount received November 1, 1871		946 81
	Amount received November 2, 1871	421 12
14	Amount received December 21, 1871	512 70
	Amount received December 22, 1871	665 21
Amount received December 25, 1871		110 25
Amount received December 26, 1871		180 55
Amount received December 29, 1871		1,626 00
Amount received June 1, 1872		100 00
Amount received June 3, 1872		100 00
Amount received June 8, 1872		51 30
Amount received June 9, 1872		130 95
Amount received June 12, 1872		288 50
Amount received June 24, 1872		17 00

The following sums received on or about the dates set opposite there-

to were applied in payment of the amount due as 80 per cent. of estimate of said engineer marked No. 13:

Amount received November 7, 1871	$291 10
Amount received November 8, 1871	218 03
Amount received November 10, 1871	3,204 12
Amount received November 15, 1871	336 05
Amount received November 16, 1871	114 18
Amount received November 21, 1871	540 79
Amount received November 23, 1871	300 00
Amount received November 24, 1871	22 99
Amount received November 25, 1871	275 55
Amount received December 7, 1871	1,037 56
Amount received December 8, 1871	287 20
Amount received December 9, 1871	251 88
Amount received December 10, 1871	115 33
Amount received December 11, 1871	139 19
Amount received December 21, 1871	188 30

The following sums received on or about the dates set opposite thereto, was applied in payment of the amount due as 80 per cent. of estimate of said engineer, marked No. 14:

Amount received December 21, 1871	$2,936 56

15 The following sums, received on or about the dates set opposite thereto, were applied in payment of the amount due as 80 per cent. of estimate of said engineer, marked No. 15:

Amount received April 4, 1872	$50 00
Amount received April 8, 1872	730 10
Amount received April 18, 1872	55 00
Amount received April 21, 1872	172 25
Amount received April 30, 1872	244 70
Amount received May 27, 1872	614 31
Amount received May 29, 1872	66 60
Amount received May 30, 1872	43 41
Amount received June 1, 1872	60 00
Amount received June 13, 1872	850 00
Amount received December 14, 1872	1,426 12
Amount received December 16, 1872	31 05
Amount received December 17, 1872	243 21
Amount received December 18, 1872	270 38
Amount received December 19, 1872	45 00
Amount received December 21, 1872	109 95

The following sums, received on or about the dates set opposite thereto, were applied in payment of the amount due as 80 per cent. of estimate of said engineer, marked No. 16:

Amount received May 3, 1872	$1,866 90
Amount received May 4, 1872	53 00
Amount received May 7, 1872	13 95
Amount received May 8, 1872	591 85
Amount received May 9, 1872	72 35
Amount received May 13, 1872	128 30
Amount received May 18, 1872	4,073 45
Amount received May 20, 1872	316 81
Amount received May 21, 1872	400 00
Amount received May 23, 1872	273 15
Amount received May 27, 1872	196 28

16 The following sums, received on or about the dates set opposite thereto, were applied in payment of the amount due as 80 per cent. of estimate of said engineer, marked No. 17:

Amount received June 20, 1872	$1,684 90
Amount received June 22, 1872	90 50
Amount received June 29, 1872	250 00
Amount received July 20, 1872	6,860 05
Amount received July 21, 1872	409 44
Amount received July 22, 1872	697 63
Amount received May 23, 1872	89 92
Amount received May 26, 1872	620 53
Amount received May 29, 1872	400 00
Amount received November 25, 1872	302 56
Amount received November 26, 1872	2,262 72
Amount received November 29, 1872	192 40
Amount received December 3, 1872	64 41
Amount received December 6, 1872	20 25
Amount received December 7, 1872	1,972 42
Amount received December 9, 1872	39 15
Amount received December 11, 1872	806 67
Amount received December 12, 1872	519 28
Amount received December 14, 1872	48 42

The following sums, received on or about the dates set opposite thereto, were applied in payment of the amount due as 80 per cent. of estimate of said engineer, marked No. 18:

Amount received July 1, 1872	1,460 80
Amount received July 2, 1872	1,043 56
Amount received July 5, 1872	2,188 19
Amount received July 6, 1872	328 10
Amount received July 12, 1872	5,272 10
Amount received July 13, 1872	75 00
Amount received July 17, 1872	120 00
Amount received July 20, 1872	2,148 70

17 The following sums, received on or about May 19, 1873, was applied in payment of the amount due on supplemental estimate marked No. 20, and annexed to said petition, the estimate being dated May 4, 1872, to wit:

Amount received May 19, 1873	$241 64

The following amount received May 20, 1873, was applied in payment of the amount due on supplemental estimate No. 21, made by said engineer, May 29, 1873:

Amount received May 29, 1873	$307 82

The following sums received on or about the dates set opposite thereto were applied in payment for the amount due for the work and materials and indebtedness mentioned in estimate of said engineer, marked "No. 19," dated December 28, 1872, and described as final estimate for Delhi Division:

Amount received December 29, 1872	210 50
Amount received December 30, 1872	246 60
Amount received December 31, 1872	13 05
Amount received January 1, 1873	626 07
Amount received January 6, 1873	320 00
Amount received January 11, 1873	551 88
Amount received January 17, 1873	100 00

Amount received January 18, 1873	943 40
Amount received January 20, 1873	948 75
Amount received February 6, 1873	1,384 07
Amount received February 13, 1873	172 09
Amount received February 14, 1873	122 20
Amount received February 18, 1373	300 00
Amount received February 20, 1873	237 84
Amount received February 24, 1873	139 75
Amount received March 27, 1873	892 41
Amount received April 24, 1873	289 80
Amount received April 25, 1873	50 00
Amount received April 28, 1873	100 00
Amount received May 3, 1873	265 30
Amount received May 10, 1873	1,062 13
18 Amount received May 20, 1873	2,227 41
Amount received May 27, 1873	914 85
Amount received May 29, 1873	241 53
Amount received May 31, 1873	255 75
Amount received June 2, 1873	200 00
Amount received June 3, 1873	39 33
Amount received June 16, 1873	500 75
Amount received June 26, 1873	908 75

The following amounts, received on or about the dates set opposite thereto, were applied in payment of last 20 per cent. of the indebtedness arising from the completion of the first five miles from the south end of the line mentioned in said contract:

Amount received August 9, 1872	406 24
Amount received August 14, 1872	39 85
Amount received November 15, 1872	65 86
Amount received November 25, 1872	2,677 18

The following amounts, received on or about the dates set opposite thereto, were applied in payment of the last 20 per cent. of the indebtedness arising from the completion of the second five miles from the south end of the line mentioned in said contract, said five miles beginning in South Fork Township, and ending in Delhi Township:

Amount received September 2, 1872	1,094 15
Amount received September 3, 1872	1,370 00
Amount received September 4, 1872	1,112 10
Amount received September 7, 1872	2,245 90
Amount received November 15, 1872	2,929 82

The following amounts, received on or about the dates set opposite thereto, were applied in payment of the last 20 per cent. of the indebtedness arising from the completion of the third five miles from the south end of the line mentioned in said contract, said five miles beginning in Delhi Township:

Amount received September 11, 1872	$500 00
19 Amount received September 18, 1872	500 00
Amount received September 30, 1872	527 45
Amount received October 5, 1772	4,806 53
Amount received October 7, 1872	38 25
Amount received October 21, 1872	951 55
Amount received October 22, 1872	463 50
Amount received October 28, 1872	528 51
Amount received November 11, 1872	682 63

Amount received November 12, 1872	208 80
Amount received November 13, 1872	275 10
Amount received November 15, 1872	953 79

The following amounts, received on or about the dates set opposite thereto, were applied in payment of the last 20 per cent. of the indebtedness arising from the completion of the fourth five miles from the south end of the line mentioned in said contract, ending in Oneida Township:

Amount received November 6, 1872	100 00
Amount received November 7, 1872	400 00
Amount received November 9, 1872	1,092 65
Amount received November 11, 1872	4,087 00

The following amounts, received on or about the dates set opposite thereto, were applied in payment of the last 20. per cent. of the indebtedness arising from the completion of the fifth five miles from the south end of the line mentioned in said contract:

Amount received November 20, 1872	$149 10
Amount received November 21, 1872	4 05
Amount received November 22, 1872	457 12
Amount received November 23, 1872	811 16
Amount received November 25, 1872	1,189 93

The foregoing amounts comprise all of the payments received upon the indebtedness to plaintiff under said contract, and all credits to which said Davenport and S't Paul Railroad Company are entitled.

Par. 25. Plaintiff alleges that the first five consecutive miles of
20 work from the south line of Delaware County was completed by the plaintiff before and accepted by said Davenport and S't Paul Railroad Company on the 31st day of July, 1872; the second five miles from the south end of said line was completed before and accepted by said railroad company on the 15th day of August, 1872; the third five miles from the south end of said line was by plaintiff completed before and accepted by said railroad company on the 10th day of September, 1872; the fourth five miles from the south end of said line was completed by plaintiff before and accepted by said railroad company on the 31st day of October, 1872; the fifth five miles from the south end of said line was completed by plaintiff before and accepted by said railroad company on the 31st day of October, 1872; and plaintiff says that the work on the entire line mentioned in said contract was completed by plaintiff before and accepted by said railroad company, and by said engineer, on the 31st day of October, 1872.

Par. 26. Plaintiff says that said work was performed upon, and said materials were furnished for, a work of internal improvement, to wit, said railroad; that said work and labor was performed and said materials furnished under a contract with said Davenport and S't Paul Railroad Company upon the road-bed and bridges and culverts owned by said railroad company, including the road-bed and the land occupied by depot buildings, side tracks, and all of the land belonging to said railroad company in Delaware County, Iowa, and used in the operation of said railroad, and the same is still the property of said railroad company. That upon the 20th day of December, A. D. 1872, plaintiff filed in the office of the clerk of the district court of Delaware County, Iowa, a statement and account for a mechanic's lien, of which a copy, marked "A," is hereunto annexed and made a part of this petition, and in said statement is included a copy of the contract mentioned in the first paragraph of this petition.

21 Par. 27. And plaintiff says that the defendants, Lucius Howard,

The Davenport Railway Construction Company (a company organized under the laws of the State of Iowa), and John Edgar Thomson and William Dennison, trustees for certain bondholders of said Davenport and S't Paul Railroad, have liens upon said property, but the lien to which plaintiff is entitled by virtue of the premises is paramount to the respective liens of said defendants.

Par. 28. Wherefore, plaintiff prays for judgment against said defendant, the Davenport and S't Paul Railroad Company, for the amount of fifty-five thousand dollars, besides interest and costs of suit, and for the enforcement of a mechanic's lien for that amount upon the said property, including the road-bed, track, depot-grounds and buildings, and all fixtures connected therewith; that said lien be declared paramount to the liens of the respective defendants, and that said defendants be foreclosed of and from all right of redemption from and after the sale thereof under execution issued upon said judgment, and that defendant have such other or further relief as may be equitable.

J. M. BRAYTON,
Attorney for Plaintiff.

STATE OF IOWA,
Delaware County, ss:

Par. 29. I, Charles F. Fleming, being duly sworn, say that I am president of the board of directors of the Delaware Railroad Construction Company, plaintiff, named in the foregoing petition; that I have heard said petition read, and that the statements therein made are true, as I verily believe.

CHARLES F. FLEMING.

Signed by Charles F. Fleming, in my presence, and by him sworn to before me, on this 15th day of January, A. D. 1874.

[SEAL.] G. B. BEVERIDGE,
Clerk Circuit Court.

22 A.

Statement and account for mechanic's lien by Delaware Railroad Construction Company upon Davenport and S't Paul Railroad, against Davenport and S't Paul Railroad Company.

The Delaware Railroad Construction Company have and claim a mechanic's lien upon all of that part of the Davenport and S't Paul Railroad, included or lying within the county of Delaware and State of Iowa, including the road-bed, tracks, and all fixtures. Said mechanic's lien exists and is claimed by virtue of work done and materials furnished for said construction company by virtue of a contract and subsequent to the date of the within contract between said companies, of which the following is a copy:

DAVENPORT AND S'T PAUL RAILROAD.

This agreement made and concluded this sixth day of August, one thousand eight hundred and seventy, between the Delaware Railroad Construction Company of the first part and the Davenport and S't Paul Railroad Company of the second part, witnesseth:

The aforesaid party of the first part, in consideration of the prices hereinafter agreed to be paid, by the party of the second part, hereby

covenants and agrees to grade and construct all of the line between the south and north line of Delaware County, of the Davenport and S't Paul Railroad, in such manner as shall conform in every respect to the annexed specifications, which shall be considered as part of this contract, and to the following conditions:

1. The work shall be commenced within sixty days aft r the execution of this contract, and shall be completed on or before the day of , one thousand eight hundred and .

2. The work shall be executed under the direction and super-
23 vision of the engineer of the company for the time being, by whose measurements and calculations the amounts of the several kinds of work performed under this contract shall be determined; and who shall have full power to reject or condemn all work or materials which, in his opinion, do not fully conform to the spirit of this agreement, and shall decide all questions which may arise between the parties relative to the execution thereof, and his decision shall be final and binding upon both parties.

3. It is further agreed, that this contract in every respect shall be prosecuted in such order and at such places and parts of the work and at such times and seasons as the said engineer may direct; also in reference to a proper and economical use of materials for the work. And any unnecessary waste of materials shall be made good by the said contractor.

4. And the said contractors further promise and agree that they will not of themselves or by their agent or agents give or sell any ardent spirits to their workmen or any other person on or near the line of said railroad or allow any to be brought on the work by the laborers or any other person, and will do all in their power to discountenance its use in the vicinity of the work by persons in their employ.

5.

6. Any omission to disapprove of defective work, at the time of any estimate, shall not be construed as an acceptance of said work.

7. If the party of the first part refuses or unreasonably neglects to remedy any imperfection which may be pointed out by the engineer, or by the party of the second part, or fails to prosecute the work with the required despatch, or in any manner violates the conditions of this contract, so that, in the judgment of the engineer or in the judgment
24 of the party of the second part, there may be just grounds of apprehension that the work will not be completed in the manner or within the time herein specified, then the engineer or said party of the second part may serve a written notice upon the said party of the first part, specifying the manner and time in which said party shall cause such grounds of apprehension to be removed, and if, at the expiration of said time, said grounds of apprehension are not removed, then full power and authority is hereby vested in said engineer or in said party of the second part to declare this contract forfeited, and on such declaration being given in writing by the engineer or by said party of the second part to the party of the first part, or if said notice shall be given by the engineer, then to the parties hereto, this contract shall cease immediately and the said party of the second part shall be entitled to the reserved percentage as a consideration for the damages that may be sustained by reason of the forfeiture of this contract. All fences must be kept up so as not to allow cattle to escape or crops to be destroyed.

In consideration of the faithful performance of all the conditions of

this contract, the party of the second part agrees to pay said party of the first part on the estimates of the engineer, as follows:

For grubbing, clearing, and side chopping the section as specified, per acre, ten dollars.

For earth excavation at the rate of 20 cents per cubic yard; for excavation of rock, including stone measuring over one cubic yard, at the rate of one dollar for solid rock per cubic yard. Loose rock seventy cents per cubic yard.

For timber and plank in bridges and wood-culverts, at the rate of thirty-five dollars per M. f't, board measure.

For piles in foundations, and for piles in bridges, at the rate of fifty cents per foot for all piles twenty feet long or less, and sixty
25 cents per foot for all piles over twenty feet, per lineal foot, to be one foot in diameter at center, and may be of black walnut, red elm, white oak, or burr oak.

For wrought-iron in bridges, at the rate of—

For cast-iron in bridges, at the rate of—

Iron to be furnished by the party of second part, —— cents per pound.

For ties fifty cents each, to be eight feet long and six inches thick, one-fourth to have at least nine, one-fourth eight, one-fourth seven, and one-fourth six inches face, and may be white oak, burr oak, black oak, red elm, black walnut, and white walnut, but not more that one-fourth black oak, and to be delivered on the line at most convenient points in view of hauling, and to be designated by engineer. The prices above specified are to be in full compensation for all materials and labor required to put the same into the work herein contracted for, and complete the same in all respects as provided in this contract. In order to enable the contractor to prosecute the work advantageously the said engineer shall make an estimate from time to time, not oftener than once per month, as the work progresses, both on work done and materials delivered on the line of said railroad. The said party of the second will pay in current money eighty per cent. of the amount of said estimate; twenty (20) per cent. of the estimates as they are made to the party of the first part may be retained by the party of the second part, as damages in case of a forfeiture of this contract; which said (20) twenty per cent., together with the whole amount of this contract, according to the terms thereof, and on the estimate of the engineer, shall be paid to the party of the first part, within thirty days after all the work herein contracted for is completed and accepted by the engineer. "Qualified below."

The above payments on estimates shall be made every thirty (30) days at the office of the president of said Davenport and S't Paul Rail-
26 road Company in Davenport. The Davenport and S't Paul Railroad Company may stop all work at any time without payment of damages by giving thirty days' notice.

Whenever five consecutive miles of work from the south line of Delaware County are completed by the party of the first part, and accepted by the party of the second part, the party of the second part shall pay the full amount of the contract price for said work on said five miles, within thirty days after said work is accepted, without the deduction of said twenty per cent., and for every additional five consecutive miles of the south end of the work completed by said first party, said second

party shall pay in like manner within thirty days after the same has been accepted, and so on through the county from south to north.

Signed this 6th day of August, A. D. 1870.

R. EDDY, *President.*
J. M. BRAYTON,
Secretary.
T. B. DOOLITTLE,
Treasurer,
Board of Directors of the Delaware Railroad Construction Company.

All the money for the work hereinbefore specified to be paid by the citizens of Delaware County.

H. PRICE,
Pres't Davenport and S't Paul R. R. Co.

The following is a just and true account of the labor done, and material furnished by virtue of said contract, and of all credits to this date, and of the amount due from said railroad company to said construction company, including interest.

(Copy of account.)

The Davenport and S't Paul Railroad Company to the Delaware Railroad Construction Co., D'r.

To excavation of 486,703 yards of earth, at 20c. per yard	$97,384	60
27 To excavation of 12,425 yards of solid rock, at $1.00 per yard	12,425	00
To excavation of 22,310 yards of loose rock, at 70c. per yard	15,617	00
To 402,080 feet timber for bridges and culverts, at $35.00 per M	16,173	01
To 15,351 feet timber not used, at $15.00 per M	230	27
To 63,398 ties, at 55c. each	34,868	90
To grubbing and clearing 44 66-100 acres, at $10.00 per acre	446	60
To 97 yards riprap, at $1.25 per yard	121	25
To 3,264 feet piling, 20 feet and under, at 50c. per foot	1,632	00
To 11,680 feet piling, 20 feet and over, at 60c. per foot	7,008	00
To interest to December 19, 1872	5,000	00
	$190,862	63

Davenport and S't Paul Railroad Company, Cr.

By amount paid to date	$119,697	05
By balance due D. R. Construction Company	$71,165	58

And for which it has and claims a mechanic's lien upon the Davenport and S't Paul Railroad, situated within Delaware County, Iowa.

R. EDDY, *President,*
A. E. MARTIN, *Secretary,*
, *Treasurer,*
Board of Directors of D. R. Construction Company.

STATE OF IOWA,
Delaware County, ss:

I, Ancil E. Martin, being duly sworn, say that I am the secretary of the Delaware Construction Railroad Company; that I have read the foregoing statement and account, and that the same is true as I verily believe, and that the said account is justly due, and said balance of $71,165.58 is owing by said Davenport and S't Paul Railroad
28 Company to said Delaware Railroad Construction Company as I verily believe.

ANCEL E. MARTIN.

Subscribed to by Ancel E. Martin in my presence, and by him sworn to before me on this 20th day of December, A. D. 1872.

A. J. BROWN,
Clerk District Court, Delaware Co., Iowa.

Filed December 20, 1872.

A. J. BROWN, *Clerk.*

Copy of resolution and proceedings of the board of directors of the Delaware Railroad Construction Company.

B.

DELHI, *July 1st*, 1872.

At a meeting of the board of directors of the Delaware Railroad Construction Company, held at the office of said company in Delhi, Iowa, July 1st, 1872, the following certified copy of a resolution passed June 5, 1872, by the executive committee of the board of directors of the Davenport and S't Paul Railroad Company was read, spread upon the records, and placed on file, to wit:

At a meeting of the executive committee of the board of directors of the Davenport and S't Paul Railroad Company, held at the office of the company, No. 47 Brady street, Davenport, Iowa, June 5, 1872, the following resolution was unanimously adopted:

Resolved, That the company hereby consents and does agree to abrogate the following clause in the contract made with the Delaware Railroad Construction Company, signed August 6, 1870, to wit, the words, "All the money for the work hereinbefore specified to be paid by the citizens of Delaware County," on the condition and agreement by the said company by a resolution by its board of directors to abate of its claim under said contract the sum of two thousand dollars on final settlement.

29 I hereby certify that the above is a true and exact copy of a resolution adopted by the executive committee of the Davenport and S't Paul Railroad Company, at a meeting held by them on the 5th day of June, 1872. In witness whereof I have hereunto set my hand and affixed the corporation seal of said company this 6th day of June, A. D. 1872.

[SEAL.]

W. H. PRICE,
Secretary Davenport, S't Paul and Pacific R. R. Co.

When the following resolution was unanimously adopted:

Resolved, That the terms of a resolution passed by the executive committee of the board of directors of Davenport and S't Paul Railroad Company, a copy of which has just been read, spread upon the records

and placed on file, be and are hereby accepted, and that we hereby agree to abate of our claim two thousand dollars on final settlement, as conditioned in said resolution.

Adjourned.

A. E. MARTIN,
Sec'y Del. Railroad Con. Co.

Copy of a resolution and proceedings of the board of directors of the Davenport and S't Paul Railroad Company.

C.

At a meeting of the executive committee of the board of directors of the Davenport and S't Paul Railroad Company, held at the office of the company, No. 47 Brady street, Davenport, Iowa, June 5, 1872, the following resolution was unanimously adopted:

Resolved, That the company hereby consents and does hereby agree to abrogate the following clause in the contract made with the Delaware Railroad Construction Company, signed August 6th, 1870, to wit, the words, "All the money for the work hereinbefore specified to be paid by the citizens of Delaware County." On the condition and agree-
30 ment by the said company, by resolution of its board of directors, to abate of its claims under said contract the sum of two thousand dollars on final settlement.

I hereby certify that the above is a true and exact copy of a resolution adopted by the executive committee of the Davenport and S't Paul Railroad Company, at a meeting held by them on the 5th day of June, A. D. 1872.

In witness whereof I have hereunto set my hand and affixed the corporation seal of the said company, this 6th day of June, A. D. 1872.

[SEAL.] W. H. PRICE,
Secretary Davenport and S't Paul Railroad Co.

ESTIMATE No. 1.

1870. Nov. 15. From October 15th to November 15th, 1870.

Delhi division Davenport and S't Paul R. R. Co. to Delaware Co. R. R. Construction Co., D'r.

For excavating 18,005 cubic yards of earth at 20c. per yard.	$3,601 00
For furnishing and putting in box culverts, 2,252 feet B. M. plank, at $35.00 per M	78 82
Total	$3,679 82
Less 20 per cent	735 96
Amount now due	$2,943 85

E. BALDWIN,
Chief Engineer.

ESTIMATE No. 2.

From November 15, 1870.

DAVENPORT, *December* 15, 1870.

Davenport and S't Paul R. R. Co. to Delaware R. R. Construction Co., D'r.

For excavating 20,091 cubic yards of earth, at 20c. per yard, on Delaware division	4,018 20
31 For excavating 123 cubic y'ds solid rock at $1.00	123 00

For excavating 900 cubic y'ds loose rock at 70c. per cubic yard	630 00
For putting in 1,262, feet, B. M., of box culverts at $35.00 per M	441 70
For grubbing and clearing 45 58-100 acres at $10 per acre.	45 80
Total	$4,861 17
Less 20 per cent	972 23
	$3,888 94

E. BALDWIN,
Chief Engineer.

ESTIMATE NO. 3.

DELHI, *January* 30, 1871.

From December 15th to January 10th, 1871.

Davenport and S't Paul Railroad Co. to Delaware R. R. Construction Co., Dr.

For excavating 18,104 cubic yards of earth at 20c. per cubic yard	$3,620 80
For excavating 412 cubic yards of solid rock at 1.00 per yard	412 00
For excavating 239 cubic yards of loose rock at 70c. per yard	167 30
For furnishing and putting in 1,536 feet, B. M., at $35.00 per M. box culverts	53 76
For grubbing and clearing 34,100 acres at $10	3 40
For furnishing 1,004 ties at 55c. for each	552 20
Total	4,809 46
Less 20 per cent	961 89
	3,847 57

E. BALDWIN,
Chief Engineer.

32 ESTIMATE NO. 4.

January estimate, from January 10th to February 1st, 1871.

FEB. 1, 1871.

Davenport and S't Paul R. R. Company to the Delaware R. R. Construction Co., Dr.

For excavating 2,445 cubic yards of earth on Delhi division at 20c. per yard	489 00
For excavating 738 cubic y'ds of solid rock at $1.00	738 00
For excavating 770 cubic y'ds of loose rock at 70c	539 00
For tunnelling and putting in box culverts, 464 B. M. of plank, at $35.00 per M	16 24

For grubbing and clearing one acre at $10.00	10 00
For furnishing 2,378 ties at 55c. for each	1,307 90
Total	3,000 14
Less 20 per cent	600 02
	2,400 12

E. BALDWIN,
Chief Engineer.

ESTIMATE NO. 5.

February estimate.

MARCH 1ST, 1871.

Davenport and S't Paul R. R. Co. to Delaware R. R. Construction Co., Dr.

For furnishing 3,728 ties, at 55c. for each	2,050 40
Less 20 per cent	410 80
	1,640 32

E. BALDWIN,
Chief Engineer.

ESTIMATE NO. 6.

Estimate up to the 1st of April, 1871.

ENGINEER'S OFFICE,
Delhi, Delaware Co., Iowa.

Davenport and S't Paul R. R. Co. to Delaware R. R. Construction Co., Dr.

For excavating 10,550 cubic yards of earth, at 20c. per yard		2,110 00
33	For excavating 1274 cubic y'ds solid rock, at $1.00	1,274 00
	For excavating 3,859 cubic y'ds of loose rock, at 70c.	2,701 30
For furnishing 11,686 ties, at 55c. each		6,427 30
For furnishing 445 feet piling, at 25c. per foot		111 25
For grubbing and clearing one acre, at $10.00		10 00
Total		$12,633 85
Less 20 per cent		2,526 77
		10,107 08

E. BALDWIN,
Chief Engineer.

ESTIMATE NO. 7.

ENGINEER'S OFFICE,
Delhi, April 1, 1871.

Estimate for Delhi division for month ending April 31, 1871.

Davenport and S't Paul R. R. Co. to Delaware R. R. Construction Co., Dr.

For excavating 24,684 cubic yards of earth, at 20c	$4,936 80
For excavating 1,392 cubic yards of solid rock, at $1.00 per yard	1,392 00

For excavating 1,906 cubic yards of loose rock, at 70c. per yard	1,334 20
For furnishing and putting in 2,700 ft. B. M. of lumber in box culverts, at $35.00 per M	94 50
For furnishing and delivering 1,605 railroad ties, at 55c. for each	882 75
For furnishing and delivering 2,095 feet lineal piling, at 25c. per foot	523 75
For grubbing and clearing 5.35-100 acres, at $10.00 per acre	53 30
Total	$9,217 50
Less 20 per cent	1,843 50
Amount due	$7,374 00

E. BALDWIN,
Chief Engineer.

34 ESTIMATE NO. 8.

ENGINEER'S OFFICE,
Delhi, June 1, 1871.

Davenport and S't Paul R. R. Co. to Delaware R. R. Construction Co., Dr.

For excavating 33,053 cubic yards of earth, at 20c. per cubic yard	$6,610 60
For excavating 853 cubic yards solid rock, at $1.00	853 00
For excavating 2,398 cubic y'ds of loose rock, at 70c. per yard	1,678 60
For furnishing and putting in 3,656 feet B. M., at $35.00 per M	127 96
For furnishing and delivering 1,542 R. R. ties, at 55c	848 10
For furnishing and delivering 2,096 feet lineal of piling, at 25c. per foot	524 00
For grubbing and clearing 15 acres, at $10.00 p'r acre	150 00
	$10,657 26
Less 20 per cent	2,131 45
	$8,525 81

E. BALDWIN,
Chief Engineer.

ESTIMATE NO. 9.

ENGINEER'S OFFICE,
Delhi, July 10, 1871.

Davenport and S't Paul Railroad Company to Delaware Railroad Construction Company, Dr.

For excavating 28,325 cubic yards of earth, on the Delhi division, at 20 cents	$5,665 00
For excavating 1,149 cubic yards of solid rock, at $1.00	1,149 00
For excavating 1,347 cubic yards of loose rock, at 70 cents per yard	942 90

For furnishing and putting in 3,341 feet B. M. lumber in box culverts, at $35.00 per M	116 93
For furnishing and delivering 2,066 ties, at 55 cents for each	1,136 30
35 For furnishing and delivering 914 feet (lineal) of piling, at 25 cents per foot	228 50
For grubbing and clearing 4 acres, at $10 per acre	40 00
For furnishing stone and laying 12 cubic yards of rip-rap, at 50 cents	6 00
	$9,284 63
Less 20 per cent	1,856 92
	$7,427 71

E. BALDWIN,
Chief Engineer.

ESTIMATE No. 10.

ENGINEER'S OFFICE,
Delhi, August 7, 1871.

Davenport and S't Paul Railroad Company to Delaware Railroad Construction Company, D'r.

For excavating 10,879 cubic yards of earth, at 20 cents per yard	$2,175 80
For excavating 264 cubic yards of solid rock, at $1	264 00
For excavating 50 cubic yards of loose rock, at 70 cents per yard	35 00
For furnishing 2,436 feet B. M., put in box culverts, at 35 cents per M	85 26
For furnishing and delivering 50 railroad ties, at 55 cents,	27 50
For grubbing and clearing 6 and 97-100 acres, at $10 per acre	69 70
	$2,657 26
Less 20 per cent	531 45
	$2,125 81

E. BALDWIN,
Chief Engineer.

36 ESTIMATE No. 11.

ENGINEER'S OFFICE,
Delhi, September 9, 1871.

Davenport and S't Paul Railroad Company to Delaware Railroad Construction Company, Dr.

For excavating 28,957 cubic yards of earth, at 20 cents per yard	$5,791 40
For excavating 351 cubic yards of solid rock, at $1 per yard	351 00
For excavating 685 cubic yards of loose rock, at 70 cents per yard	479 50

For furnishing material and putting in 2,392 feet B. M., in box culvert, at $35 per M		83 72
For furnishing 157 ties, at 55 cents each		86 35
For grubbing and clearing 1½ acres, at $10 per acre		15 00
For furnishing and driving 780 lineal feet of piling, at 50 cents per foot, and 500 feet, at 60 cents per foot		
For furnishing and putting up 24,572 feet B. M. of timber in bridging, at $35 per M	$1,550 02	
Less previous estimate for piles delivered	$1,387 50	
		162 52
		$6,969 40
Less 20 per cent		1,393 89
		$5,575 60

E. BALDWIN,
Chief Engineer.

ESTIMATE No. 12.

ENGINEER'S OFFICE,
Delhi, October 4, 1871.

Davenport and S't Paul Railroad Company to Delaware Railroad Construction Company, Dr.

For excavating 26,554 cubic yards of earth, at 20 cents per yard	$5,310 80
For excavating 775 cubic yards of solid rock, at $1 per yard	775 00
37 For excavating 509 cubic yards of loose rock, at 70 cents per yard	356 30
For furnishing material and putting in 3,468 feet B. M. in box culverts, at $35 per M	121 38
For furnishing and delivering 103 ties, at 55 cents each	56 65
For grubbing and clearing 2 and 45-100 acres, at $10 per acre	24 50
For putting in 15 yards of rip-rap, at 50 cents	7 50
For furnishing and driving 300 lineal feet piling, at 50 cents per foot, 20 feet long	150 00
For furnishing and driving 3,500 feet of piling, over 20 feet long, at 60 cents per foot	2,100 00
For furnishing material and erecting 18,828 feet B. M. of bridging, at $35 per M	658 98
	$9,561 11
Less 20 per cent	1,912 22
	$7,648 89

ESTIMATE No. 13, FOR MONTH OF OCTOBER.

ENGINEER'S OFFICE,
Delhi, November 4, 1871.

Davenport and S't Paul Railroad Company to Delaware Railroad Construction Company, Dr.

For excavating 18,733 cubic yards of earth, at 20 cents per yard	$3,746 60

For excavating 563 cubic yards of solid rock, at $1 per yard	563 00
For excavating 229 cubic yards of loose rock, at 70 cents per yard	160 30
For furnishing material and putting 1,780 feet B. M. in box culverts, at $35 per M	62 30
For grubbing and clearing 1¼ acres, at $10 per acre	12 50
For furnishing and driving 80 lineal feet of piling, 20 feet long, at 20 cents per foot	40 00
38 For furnishing and driving 3,222 lineal feet of piling over 20 feet long, at 60 cents per foot	1,933 20
For furnishing material and erecting 74,583 feet B. M. of bridging, at $35 per M	2,610 40
	$9,128 30
Less 20 per cent	1,825 66
	$7,302 64

E. BALDWIN,
Chief Engineer.

ESTIMATE NO. 14, FOR NOVEMBER.

ENGINEER'S OFFICE,
December 15, 1871.

The Davenport and S't Paul Railroad Company to Delaware Railroad Construction Company, D'r.

For excavating 11,787 cubic yards of earth, at 20 cents per yard	$2,357 40
For excavating 50 cubic yards solid rock, at $1 per yard	50 00
For excavating 88 yards of loose rock, at 70 cents per yard	61 60
For furnishing material and putting in 1,500 feet, B.M., lumber in culverts	52 50
For grubbing and clearing 1¾ acres, at $10 per acre	17 50
For furnishing and driving 930 lineal feet of piling over 20 feet in length, at 60 cents per foot	558 00
For furnishing 16,287 feet, B.M., of bridge-timber, at 35 cents per M	570 04
	$3,667 04
Less 20 per cent	733 41
	$2,933 63

E. BALDWIN,
Chief Engineer.

39 ESTIMATE NO. 15, MADE APRIL, 1872.

ENGINEER'S OFFICE, *Delhi, April* 25, 1872.

Davenport and S't Paul Railroad Company to Delaware Railroad Construction Company, D'r.

For excavating 6,011 cubic yards of earth, at 20 cents per yard	$1,202 20
For excavating 290 cubic yards of solid rock, at $1 per yard	290 00

For excavating 250 cubic yards of loose rock, at 70 cents per yard	175 00
For furnishing and delivering 80,000 feet, B. M., of bridging, at $25 per M	2,000 00
For furnishing and delivering 12,359 ties, at 55 cents each.	6,797 45
For furnishing and delivering 1,630 lineal feet of piling, at 25 cents per foot	407 50
For furnishing and delivering 2,100 lineal feet of piling, at 60 cents per foot	1,260 00
	$12,132 15
Less 20 per cent	2,426 43
	$9,705 72

E. BALDWIN,
Chief Engineer.

ESTIMATE NO. 16?

ENGINEER'S OFFICE, *Davenport, May* 1, 1872.

Davenport and S't Paul Railroad Company to Delaware Railroad Construction Co., D'r.

For excavating 25,457 cubic yards of earth, at 20c. per yard	$5,091 40
For excavating 700 cubic yards of solid rock, at $1 per yard	700 00
For excavating 2,800 cubic yards of loose rock, at 70c. per yard	1,960 00
40 For furnishing and putting in box-culverts 2,624 feet, B. M., of lumber, at $35 per M	91 84
For furnishing and driving 700 lineal feet of piling, at 50c. per foot	350 00
For furnishing and delivering 3,138 ties, at 55c. each	1,725 90
For grubbing and clearing four acres, at 10 per acre	40 00
Total for the month of April	9,959 14
Less 20 per cent	1,991 82
	7,967 31

E. BALDWIN,
Chief Engineer.

ESTIMATE NO. 17, ESTIMATE FOR MAY, 1872.

ENGINEER'S OFFICE, *Davenport, June* 15, 1872.

Davenport and S't Paul Railroad Company to Delaware Railroad Construction Co., Dr.

For excavating 82,229 cubic yards of earth, at 20c. per yard	$16,445 80
For excavating 983 cubic feet of solid rock, at $1 per yard.	983 00
For excavating 2,193 cubic yards of loose rock, at 70c. per yard	1,535 10

For furnishing material and putting 8,780 feet, B. M., of lumber in box culverts, at $35 per M	307 30
For furnishing and delivering 6,328 ties, at 55c. each	3,480 40
	22,751 60
Less 20 per cent	4,550 32
	18,201 28

E. BALDWIN,
Chief Engineer.

41 ESTIMATE NO. 18.

ENGINEER'S OFFICE, *July* 1, 1872.

Davenport and S't Paul Railroad Company to Delaware Railroad Construction Co., Dr.

For earth excavation, 34,143 cubic yards, at 20c. per yard	$6,828 60
For solid rock excavation, 758 cubic yards, at $1	758 00
For loose rock excavation, 878 cubic yards, at 70c. per cubic yard	614 60
For furnishing ties, 5,939, at 55c. each	3,266 45
For furnishing and driving piling, 1,260 feet, at 50c. per foot (lineal)	630 00
For furnishing and driving piling, 1,378 feet, at 60c. per foot (lineal)	826 80
For furnishing and putting up bridging, 81,356 feet, board measure, at $35 per M	2,847 46
	15,771 91
Less 20 per cent	3,154 38
	12,617 53

E. BALDWIN,
Chief Engineer.

NO. 19.

FINAL ESTIMATE OF DELHI DIVISION.

ENGINEER'S OFFICE,
Davenport, Dec. 28, 1872.

Davenport and S't Paul Railroad Company to Delaware R. R. Construction Co., D'r.

For earth excavation, 486,058 cubic yards, at 20c. per yard	$97,211 60
For solid rock excavation, 12,425 cubic yards, at $1 per yard	12,425 00
For loose rock excavation, 22,310 cubic yards, at 70 c. per yard	15,617 00
For furnishing material and building culverts and bridges, 462,086 feet, B. M., at $35 per M	16,173 01
42 For furnishing and delivering ties, 63,461, at 55c. each	34,903 55

For rip-rap, 27 cubic yards, at 50c. per yard	13 50
For rip-rap, 70 cubic yards, at $1.15 per yard	80 50
For piling, not over 20 feet in length, 3,264 feet, lineal, at 50c. per foot	1,632 00
For piling, 11,680 feet, at 60c. per foot	7,008 00
For grubbing and clearing 45.66 acres, at $10 per acre	456 60
	185,520 76

The above is a final estimate for the Delhi division, and includes all former estimates.

E. BALDWIN,
Chief Engineer.

SUPPLEMENTAL ESTIMATE NO. 20.

Davenport and St Paul Railroad Co. to Boon & Martin, Dr.

To lumber furnished for bridges, 15,551 feet, B. M., at $15.50 per M	$241 04

Approved May 4, 1873.

E. BALDWIN,
Chief Engineer.

SUPPLEMENTAL ESTIMATE NO. 21.

May 29, 1873.

Davenport and St Paul R. R. Co. to Delaware R. R. Construction Co., Dr

For furnishing and delivering ties, 152, at 55c. each	$83 60
For furnishing lumber and putting same in box culverts, 235 feet, at $35 per M	8 22
For earth excavation, 1,080 cubic yards, at 20c. per yard	216 00
	307 82

Approved.

E. BALDWIN,
Chief Engineer.

43 Due service of copy of this petition is admitted this 15th day of January, 1874.

PETERS & HEATH,
Attorneys for def't, The D. & St P. R. R. Co.

Filed January 15, 1874.

G. B. BEVERIDGE, *Clerk.*

And afterwards there was filed in the office of the clerk of said court for said Delaware County, Iowa, an amended petition in said cause in words and figures following, to wit:

Amended petition in equity.

Im the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson and William Dennison, trustees for certain bondholders of said railroad, The Davenport Railway Construction Company, and Lucius Howard.

Par. 1. The plaintiff in the above-entitled suit, by way of amendment to their original petition filed in said suit, says that the amount of $443.49 mentioned in the 24th paragraph of said petition as having been paid on the 11th day of February, A. D. 1871, and applied in part payment of Estimate No. 4, should have been $493.49.

Par. 2. That the sum of $30 was paid on or about the 1st day of June, 1871, and applied in part payment of the indebtedness due as 80 per cent. of Estimate No. 8, made by said engineer and described in said original petition.

Par. 3. That the amount of $123.68, mentioned in said paragraph No. 24 as having been paid upon the 22nd day of August, A. D. 1871, and applied in part payment of the indebtedness due as 80 per cent. of Estimate No. 9, should be the sum of $133.68.

44

Par. 4. That the amount of 91.26, mentioned in said paragraph as having been paid on the 22nd day of August, A. D. 1871, and applied in part payment of the indebtedness due as 80 per cent. of Estimate No. 10 of said engineer, should be $281.26.

Par. 5. That the sum of $578.55, mentioned as having been paid on the 19th day of September, 1871, and applied in part payment of the indebtedness due as 80 per cent. of the estimate of said engineer marked No. 11 in said petition, should be $598.55, and is hereby corrected.

Par. 6. That the amounts of $100.00, mentioned as having been paid June 1st, 1872, and $100.00 June 3rd, 1872, and applied in payment of the 80 per cent. of Estimate No. 12 in the engineer's report referred to in said petition, should be one on January 1st, 1872, the other January 3rd, 1872. That the following amounts applied in payment of the indebtedness of 80 per cent. of Estimate No. 12 aforesaid, and in said petition mentioned as paid in the month of June, 1872, should be on the corresponding days of the month of February, 1872, to wit:

$51.36,	dated	June	8,	should be	February	8, 1872.
130.95,	"	"	9,	"	"	9, 1872.
288.50,	"	"	12,	"	"	12, 1872.
17.00,	"	"	24,	"	"	14, 1872.

Par. 7. That the following amounts received on or about the respective dates set opposite thereto were also applied in payment of the indebtedness for the work and materials mentioned in Estimate No. 19 of said engineer, called final estimate in said petition, to wit:

Amount received May 22, 1873	$250 00
Amount received May 26, 1873	224 15
Amount received May 29, 1873	100 00

45 Par. 8. That the amount of $255.74, mentioned in said petition as having been paid on the 31st day of May, 1873, and applied upon the indebtedness arising from the work and materials mentioned in estimate No. 19, called final estimate, should be $235.74.

Par. 9. That the above, with the amounts mentioned in plaintiff's original petition, are all the payments made to plaintiff, upon the contract described in said petition, and all of the payments included in this and said original petition, in the aggregate, amount only to the total sum of one hundred and thirty-nine thousand one hundred and eighty-nine dollars and forty-six cents.

Par. 10. That the amount of indebtedness due under the respective estimates and upon said contract have been demanded many times of said Davenport and St. Paul Railroad Company and said railroad company refused and still refuses to pay the same.

Par. 11. The plaintiff alleges that the statements of the original petition, as amended herein, are true and asks judgment and relief, as prayed for in said original petition.

J. M. BRAYTON,
Attorney for Plaintiff.

STATE OF IOWA,
Delaware County, ss:

I, Ancel E. Martin, being duly sworn, say that I am secretary of the board of directors of the plaintiff, named in the foregoing petition, that I have read the same and know its contents and that the matters and things therein stated and set forth are true, as I verily believe.

ANCEL E. MARTIN.

Subscribed by Ancel E. Martin, in my presence and by him sworn to, before me, on this 19th day of January, 1874.

[SEAL.] G. B. BEVERAGE, *Clerk.*

46 Service of a copy of the within petition admitted this 19th day of January, 1874.

PETERS & HEATH,
Attorneys for Defendant.

Filed January 19, 1874.

G. B. BEVERIDGE, *Clerk.*

And afterwards there was filed in the office of the clerk of said court an original notice, in words and figures following, to wit:

Original notice.

In the circuit court of Delaware Co., Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson and William, trustees for certain bond-holders of said railroad, the Davenport Railway Construction Company, and Lucius Howard.

To the Davenport and S't Paul Railroad Company, John Edgar Thomson and William Dennison, trustees for certain bond-holders of said railroad, the Davenport Railway Construction Company, and Lucius Howard:

You are hereby notified that on or before the 15th day of January,

A. D. 1874, there will be on file, in the office of the clerk of the circuit court of Delaware County, Iowa, a petition of the Delaware Railroad Construction Company, claiming of you the sum of fifty-five thousand dollars, as money due to said plaintiffs from said Davenport and S't Paul Railroad Company, for breach of contract, and for work, labor, and services performed, and material furnished in the construction of that portion of said railroad situated in Delaware County, also claiming a mechanic's lien on said road, and the enforcement thereof, as against all of said defendants, for said amount.

47 And you are notified that unless you appear thereto and defend on or before noon of the second day of the January term, A. D. 1874, of said court, which will commence at Delhi on the 26th day of January, A. D. 1874, default will be entered against you, and judgment will be rendered thereon for the amount above claimed, with interest and costs of suit, and for the enforcement of said lien.

No personal claim is made against any of said defendants, except the Davenport and S't Paul Railroad Company, January 9, 1874.

J. M. BRAYTON,
Attorney for Plaintiff.

Attached to which was a return of the sheriff of said Delaware County, Iowa, in words and figures following, to wit:

THE STATE OF IOWA,
Delaware County, ss:

I do hereby certify and return that the within original notice came to hand for service on the 10th day of January, A. D. 1874, and that the same day I served the same on the within-named defendant, the Davenport and S't Paul Railroad Company, by reading the same to S. S. Summers personally, and in his presence and hearing, and by delivering to him personally a true copy thereof. The said S. S. Summers being station and ticket agent for said company in Delhi, Delaware County, Iowa. Done in Delhi, Delaware County, Iowa. The other defendants not found by me in my county.

ABNER DUNHAM,
Sheriff Delaware County, Iowa.

Fees: Service, 50; mileage (8 mile), 40; copy, 40=$1.30.
Filed January 26, 1874.

G. B. BEVERIDGE, *Clerk.*

48 And afterwards, to wit, on the 28th day of January, 1874, there was filed in the office of the clerk of said circuit court an answer in words and figures following, to wit:

Answer.

In the circuit court of the State of Iowa in and for Delaware County.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.
} In chancery.

And now, January term, 1874, comes the defendant, the Davenport and S't Paul Railroad Company, and for answer to the petition of the plaintiff herein, says: It admits the making and delivery of the con-

tract in said petition mentioned; admits that under the said contract the plaintiff performed the work shown by the estimates set forth in the said petition; admits that there is a balance unpaid to the plaintiff of the contract price of the said work, but avers that it hath no knowledge or information concerning the amount thereof.

Further, the said defendant avers that at or about the time of the making of the said contract, the defendant deposited in the hands of a certain F. B. Doolittle, then and for a long space of time the treasurer of the plaintiff corporation, stock subscriptions and promissory notes amounting to the sum of eighty-three thousand five hundred dollars or thereabouts, the same to be taken and collected and the proceeds applied to the payment of the plaintiff, for the work performed by them under the said contract and for other purposes, a large amount of which was so collected and so applied; that defendant cannot now specifically state the items making up the said sum, but is informed and believes that if an account be taken, as hereinafter prayed, the same can be fully shown by the books and papers of the plaintiffs. Further-
49 more, the defendant avers that it turned over to the said Doolittle a large amount of taxes, voted in the townships of South Fork and Delhi, and authorized said Doolittle to take and receive the same for the purposes aforesaid, of which the said Doolittle took and received a large amount of money to the defendant unknown, and appropriated a large amount thereof, to the defendant unknown, for the payment of the plaintiff for said work. Further, the defendant avers that it hath paid to the said Doolittle, for the purposes aforesaid, a large amount of money, to wit, the sum of seventy thousand dollars or thereabouts, upon the drafts of the said Doolittle, a large amount of which has been by him appropriated to the payment of the plaintiff for the work aforesaid. And thereupon the defendant prays that an account be taken of the said several matters herein set forth, and the amount of moneys received therefrom, by plaintiff, be ascertained.

2. Further, the defendant shows that the plaintiff now holds two certain promissory notes of defendant for the sum of $5,000 each, taken as a conditional payment of a part of the money due for the said work, and thereupon the defendant prays that the plaintiff be required to surrender up and cancel the said notes, or that upon the election of the plaintiff to retain the same, the same to be taken as a payment to plaintiff of so much of their claim.

3. Defendant avers that heretofore, to wit, at the October term of the district court of Delaware County, by the consideration of the said court, a certain Westphall Hines & Co. recovered against the said plaintiffs the sum of $2,513.38, and obtained a decree of the said court establishing their lien against the property of this defendant for the payment of their said judgment. The record and proceedings in the said last-mentioned cause are hereby made a part of this answer, the said judgment being for work and labor done and performed by a certain S. Denton & Co., for the plaintiff, in the construction of defendant's road-bed, and thereupon defendant prays that the said judg-
50 ment, with the interest and costs thereon, be credited to the defendant upon the claim of the plaintiff.

And thereupon the defendant prays that an account be taken and a decree rendered in accordance with the prayers subjoined to the several paragraphs hereof.

PETER HEATH,
Defendant's Attorney.

STATE OF IOWA,
Delaware County, ss:

I, James D. Campbell, being duly sworn, do say that I am the general solicitor of the defendant—The Davenport and S't Paul Railroad Company—and as such, it became my duty to examine all the books and papers of defendant in relation to the several transactions in this answer mentioned; that thereby I have knowledge thereof; that I have read the foregoing petition, and know the contents thereof; that the statements thereof are true, as I verily believe.

J. D. CAMPBELL.

Subscribed by J. D. Campbell in my presence, and by him sworn to before me on this 28th day of January, A. D. 1874.

[SEAL.] W. A. HEATH,
Notary Public of Iowa in and for Delaware County.

Filed January 28, 1874.

G. B. BEVERIDGE, *Clerk.*

And afterwards, to wit, on the 30th day of January, 1874, it being the fifth day of the January term, 1874, of said court, the plaintiff filed a reply to the answer of the said Davenport and S't Paul Railroad Company on file in said cause, in words and figures following, to wit:

51 *Reply.*

In the circuit court of Delaware Co., Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.

The said plaintiff, for reply to the answer of defendant filed in said suit, says that the stock subscriptions and promissory notes mentioned in said answer as amounting to the sum of eighty-three thousand five hundred dollars, or thereabouts, were deposited with said F. B. Doolitle, as an officer of said railroad company, defendant, and not as treasurer or officer of plaintiff, said Doolittle, at the time of such deposit, and for some years thereafter, being and acting as assistant treasurer of said defendant, and being now an officer of said defendant.

And plaintiff says that the taxes mentioned in said answer as having been received by said Doolittle were received by him as assistant treasurer of defendant, and not as an officer of plaintiff. That a large amount of the seventy thousand dollars, or thereabouts, mentioned in said answer as having been received by said Doolittle, upon the drafts of defendant, were received by him as said assistant treasurer of defendant; that a large amount, to wit, the sum of twenty thousand dollars, was unpaid at maturity, and was returned to defendant, and that all of the remainder paid to plaintiff has been credited to defendant in said plaintiff's petition. Plaintiff says that F. B. Doolittle is not now, and has not been during the pendency of this suit, nor for a long time previous thereto, an officer or treasurer of plaintiff, but that he is, and for a long time hitherto has been, an officer, to wit, a member of the board of directors of the defendant and the Davenport and S't Paul Railroad Company.

52 2. Plaintiff says that one of the two notes of $5,000 each, mentioned in said answer, has been returned to defendant since the commencement of this suit, and plaintiff is ready and offers to surrender the other note of $5,000 mentioned to defendant for cancellation.

3. Plaintiff says that the judgment mentioned in said answer, in favor of L. Denton & Co., has not been paid, and plaintiff is willing that defendant shall have credit therefor upon the claim in this suit whenever said defendant shall pay said claim, and not until such payment.

Plaintiff therefore prays judgment and decree, as asked for in this petition.

J. M. BRAYTON,
Attorney for Plaintiff.

STATE OF IOWA,
Delaware County, ss·

I, Ancel E. Martin, being duly sworn, say that I am an officer, to wit, secretary and member of the board of directors of plaintiff, named in the foregoing reply; that I have read the same, and that the statements therein made are true, as I verily believe.

[SEAL.] ANCEL E. MARTIN.

Subscribed and sworn to by Ancel E. Martin, before me and in my presence, on this 30th day of January, 1874.

G. B. BEVERIDGE, *Clerk*,
By H. C. HAEBERLE, *Deputy*.

Filed January 30, 1874.

And afterwards, to wit, on the 14th day of February, 1875, the referee duly appointed by said court in this cause filed his report in said cause, with the clerk of said court, in the words and figures following, viz:

To the Hon. S. Bagg, judge of the circuit court of Delaware County, Iowa:

53 The undersigned referee, appointed at the January term of the circuit court of Delaware County, Iowa, to report the amount due the plaintiff in the case pending in the said court, entitled The Delaware Railroad Construction Company vs. The Davenport and S't Paul Railroad Company et al., respectfully submits this report.

After taking the oath hereto annexed, the parties came before me at my office in Delhi, the plaintiff appearing by J. M. Brayton, and the defendant, the Davenport and S't Paul Railroad Company, by Peters & Heath, when I proceeded to receive evidence and take testimony. The examination was commenced on the 9th and completed on the 12th day of February, 1874, as shown by the minutes hereto attached. Upon examining the case with the evidence and testimony introduced, I find that the defendant, the Davenport and S't Paul Railroad Company, was indebted to the plaintiff on the 6th day of February, 1874, upon the claim in controversey in this suit in the sum of fifty-one thousand nine hundred and thirty dollars and fifty-four cent (51,930 54), and that the plaintiff, the Delaware Railroad Construction Company, is entitled to a judgment against said Davenport and S't Paul Railroad Company for said sum of 51,930.54, and costs of suit to be taxed by the clerk of said court, said judgment to date and bear interest from the said 6th day of February, 1874, at the rate of six per cent. per annum. I further find that the plaintiff is entitled to a judgment of the same date establishing

a mechanic's lien as prayed in the petition in this suit, said lien to date from the 29th day of September, 1870.

In ascertaining the amount due the plaintiff as aforesaid, I allowed the defendant a credit of two thousand ($2,000) dollars upon the contract as shown in the Exhibit C and D, as shown in said minutes, deducting that sum as of the 6th day of February, 1874.

The following persons were sworn and examined as witnesses, viz: F. B. Doolittle, A. E. Martin, and R. Eddy. The following is the number of days' attendance of each witness respectively:

54 F. B. Doolittle, 3 days; A. E. Martin, 3 days; R. Eddy, 1 day.

The following is the amount of time spent by the referee, viz:

On the 9th day of January, 4 hours.
On the 10th day of January, 4 hours.
On the 11th day of January, 4 hours.
On the 12th day of January, 5 hours.

I find that F. B. Doolittle did not receive any stock subscriptions, promis'ory notes for collection, or taxes, as an officer of the plaintiff, and that all drafts received by said F. B. Doolittle have been credited by plaintiff to defendant, except such as have been returned to the defendant by the said Doolittle, and one note for $5,000, which is hereto attached, marked "Exhibit B," and which is offered by plaintiff for cancellation.

I further find that judgment in favor of Westphall, Hinds & Co., for work done by S. Denton & Co., for plaintiff, as stated in defendant's answer, is a lien upon the road-bed of the defendant, and in case said defendant shall pay said judgment of Westphall, Hinds & Co., or any part thereof, such payment shall operate as a payment by defendant upon the judgment in this suit.

HENRY HARGER,
Referee.

In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson and William Dennison, trustees for certain bondholders of said railroad, the Davenport Railway Construction Company, and Lucius Howard.

On this 9th day of February, 1874, at 9 o'clock a. m., the parties
55 appeared in this case before Henry Herger, referee. The plaintiff appearing by J. M. Brayton, its attorney; and the defendant, the Davenport and S't Paul Railroad Company, by Peters & Heath, its attorney; and by consent of counsel appearing, the hearing of this case is adjourned till 2 o'clock this afternoon. No appearance of the other defendant is made.

On this 9th day of February, 1874, at 2 o'clock p. m., parties appearing at 9 o'clock this morning, plaintiff submits in evidence the contract between said Davenport and S't Paul Railroad Company and the Delaware Railroad Construction Company, and the 21 estimates of the engineer, said contract and estimates being the originals, copies of which are annexed to plaintiff's petition; also a receipt from J. S. Conner,

treasurer of Davenport and S't Paul Railroad Company, to F. B. Doolittle, for a note of $3,000, a copy of which is hereto attached, marked "Exhibit A." Plaintiff also offers a note for $5,000, dated December 4, 1873, made by said Davenport and S't Paul Railroad Company to F. B. Doolittle, treasurer Delaware R. R. Construction Company, which is hereto attached, marked "Exhibit B."

Plaintiff also offers a certified copy of a resolution adopted by the board of directors of said Davenport and S't Paul Railroad Company, June 5, 1872, a copy of which is hereto attached, marked "Exhibit C." Plaintiff also offers a certified copy of a resolution of the board of directors of the Delaware Railroad Construction Company, which is hereto attached, marked "Exhibit D."

Plaintiff then introduced F. B. DOOLITTLE as a witness, who, being first duly sworn, testifies as follows:

Int. 1. Are you an officer of plaintiff now?

Ans. No.

Int. 2. Are you an officer of the defendant, the railroad company?

Ans. I am.

56 Int. 3. Were you formerly an officer of plaintiff? and, if so, state what office.

Ans. I was formerly treasurer of the plaintiff.

Int. 4. What was the entire amount received by you while you were treasurer of plaintiff, did you receive from the defendant?

Ans. One hundred and thirty-nine thousand one hundred and eighty-nine dollars and forty-six cents.

Int. 5. As treasurer of plaintiff, did you receive any stock, subscription, or promissory notes for collection?

Ans. No.

Int. 6. Did you, as officer of the plaintiff, receive any taxes levied in South Fork or Delhi Township?

Ans. No.

Int. 7. Aside from the two notes of $5,000 each, one of which has been introduced before the referee, and the receipt for the other, have you received from the defendant any drafts that were not included in the sum you have mentioned?

Ans. None but what have been returned to defendant.

Cross-examination:

Int. 1. In what capacity did you receive stock, subscription, and the taxes referred to by you in your direct examination?

Ans. As assistant treasurer of the defendant.

Int. 2. Have any payments been made to plaintiff by defendant, other than those made to you as treasurer of plaintiff, so far as you know?

Ans. There have not, so far as I know.

Int. 3. State the times of the several payments made to plaintiff by defendant, as the same appears on your books, or from your accounts.

57 Ans. I have a schedule of accounts which I here submit, showing the time and amounts of said payment.

Pending the further answer to this question, the examination was adjourned till to-morrow morning at 9 o'clock a. m.

On this 10th day of February, 1874, at 9 o'clock a. m., examination resumed. The witness compares items in the schedule with those in the petition. At 1 o'clock p. m., examination was adjourned till 2 o'clock p. m., on the 11th day of February, 1874.

On this 11th day of February, 1874, at 2 o'clock p. m., examination resumed and testimony of E. A. Martin taken, after which the examination was adjourned till the 12th day of February, 1874, at 2 o'clock p. m. The testimony of E. A. Martin is hereto attached.

On the 12th day of February, 1874, at 2 o'clock p. m., examination resumed and the testimony of R. Eddy taken, which is hereto attached.

The schedule of accounts submitted by F. B. Doolittle, on the 9th day of February, having been compared with the petition, was found to be substantially the same, with the following exceptions:

1. A credit of $2,695.45 which should appear as of the 6th day of March, 1873, instead of the same amount of money which had been credited, in smaller amounts, on the 27th, 29th, and 31st of May, and the 2d, 3d, 16th, and 26th days of June, 1873.

2. Of a credit on the 20th day of April, of 1873..... $831 22
Of a credit on the 29th day of April, of 1873..... 193 26
Of a credit on the 5th day of May, of 1873..... 232 80
Of a credit on the 5th day of May, of 1873..... 457 06
Of a credit on the 2d day of May, of 1873..... 97 08
Of a credit on the 31st day of Jan., of 1873..... 369 45

which amounts had been credited as of the 20th day of May, 1873.

58 At this point both parties said they had no further evidence and testimony to produce, and the matter was submitted to the referee.

Testimony of (A. E. Martin?) R. E. Eddy.

This 12th day of February, 1874, R. EDDY, being duly sworn, testifies as follows, viz:

Int. 1. What office, if any, do you hold for the plaintiff?

Ans. Treasurer.

Int. 2. Have you been a member of that corporation since its origin?

Ans. I have.

Int. 3. State what person or persons, besides yourself, have been treasurer of said company.

Ans. F. B. Doolittle.

Int. 4. Is he the only person, other than yourself, who has been treasurer of plaintiff?

Ans. Yes.

Int. 5. While you were treasurer of plaintiff, has there been any payment made to you as such treasurer by the Davenport and S't Paul Railroad Company?

Ans. No.

Int. 6. Have you now, or have you had since you were treasurer, any books of said company?

Ans. No.

Int. 7. State what papers, if any, you have in your possession as treasurer of plaintiff while you have held the office.

Ans. The note and receipt filed with the referee and a statement of accounts made by F. B. Doolittle.

59 Int. 8. Did the statement of accounts you refer to show any greater credit to the Davenport and S't Paul Railroad Company than the sum of one hundred and thirty-nine thousand one hundred and eighty-nine dollars and forty-six cents ($139,189.46)?

Ans. No.

Testimony of (R. Eddy ?) A. E. Martin.

This 11th day of February, 1874, A. E. MARTIN, being duly sworn, says:

Int. 1. Are you an officer of plaintiff?

Ans. I am.

Int. 2. What office do you hold?

Ans. Secretary.

Int. 3. Do the books in your office show that the payments made by the defendant to plaintiff exceed the sum of one hundred and fifty-nine thousand one hundred and eighty-nine dollars and fifty-six cents?

Ans. They do not.

Int. 4. How long have you been secretary?

Ans. Since December, 1870.

EXHIBIT A.

Copy of receipt of J. S. Conner, treasurer.

DAVENPORT AND S'T PAUL RAILROAD CO.,
Davenport, Iowa, Jan. 27, 1874.

F. B. DOOLITTLE, Esq., *Delhi, Iowa:*

DEAR SIR: I am to-day in receipt of yours of the 26th, enclosing company's promissory note, dated Dec. 3, 1873, at sixty days, for $5,000, given to you as treasurer of Delaware Railroad Construction Company.

Yours, very respectfully,

J. S. CONNER,
Treasurer.

60 EXHIBIT B.

Copy of note attached to report of referee.

$5,000.] DAVENPORT, IOWA, *Dec.* 4, 1873.

Sixty days after date, we promise to pay to the order of F. B. Doolittle, treasurer of Delaware Railroad Construction Company, five thousand dollars at the Davenport National Bank, value received, with ten per cent. interest after maturity.

DAV. & S'T PAUL R. R. CO.,
By J. S. CONNER, *Treas.*

EXHIBIT C.

At a meeting of the executive committee of the board of directors of the Davenport and S't Paul Railroad Company, held at the office of the company, No. 47 Brady street, Davenport, Iowa, June 5, 1872, the following resolution was unanimously adopted:

Resolved, That this company hereby consents, and does agree, to abrogate the following clause in the contract made with the Delaware Railroad Construction Company, signed August 6, 1870, to wit, the words:

"All the money for the work hereinbefore specified to be paid by the citizens of Delaware County."

On the condition and agreement by the said company, by a resolution of its board of directors, to abate of its claim under said contract the sum of two thousand dollars on final settlement.

I hereby certify that the above is a true and exact copy o a resolution adopted by the executive committee of the D. & S't P. R. R. Co., at a meeting held by them on the 5th day of June, A. D. 1872.

61 In witness whereof I have hereunto set my hand and affixed the corporate seal of the said company, this 6th day of June, A. D. 1872.

[SEAL.]

W. H. PRICE,
Sec'y D. & S't P. R. R. Co.

EXHIBIT D.

DELHI, *July* 1, 1872.

At a meeting of the board of directors of the Delaware Railroad Construction Company, in Delhi, Iowa, July 1, 1872, the following certified copy of a resolution passed June 5, 1872, by the executive committee of the board of directors of the Davenport and S't Paul Railroad Company was read, spread upon the records, and placed on file, to wit:

At a meeting of the executive committee of the board of directors of the Davenport and S't Paul R. R. Co., held at the office of the company, No. 47 Brady street, Davenport, Iowa, June 5, 1872, the following resolution was unanimously adopted:

Resolved, That this company hereby consents, and does agree, to abrogate the following clause in the contract made with the Delaware Railroad Construction Company, signed August 6, 1870, to wit, the words: "All the money for the work hereinbefore specified to be paid by the citizens of Delaware County," on the condition and agreement of the said company, by a resolution of its board of directors, to abate of its claim under said contract the sum of two thousand dollars on final settlement.

I hereby certify that the above is a true and exact copy of a resolution adopted by the executive committee of the Davenport and S't Paul Railroad Company, at a meeting held by them on the 5th day of June, A. D. 1872.

In witness whereof I have hereunto set my hand and affixed the corporation seal of said company, this 6th day of June, A. D. 1872.

[SEAL.]

W. H. PRICE,
Secretary D. and S't Paul R. R. Co.

62 When the following resolution was unanimously adopted:

Resolved, That the terms of a resolution, passed by the executive committee of the board of directors of the D. & S't P. R. R. Co., a copy of which has just been read, spread upon the records, and placed upon file, be and are hereby accepted; and that we hereby agree to abate of our claim two thousand dollars on final settlement, as condition in said resolution. Adjourned.

A. E. MARTIN,
Secretary Delaware R. R. Construction Co.

I hereby certify that the above is a true and exact copy of a resolution and proceedings of the executive committee of the Delaware R. R. Cons. Co. at a meeting held by them on the 1st day of July, A. D. 1872.

In witness whereof I have hereunto set my hand this 9th day of February, 1874.

A. E. MARTIN,
Secretary Del. R. R. Construction Co.

STATE OF IOWA,
Delaware County:

I, Henry Harger, being duly sworn, say that I will well and faithfully hear and examine the case pending in the circuit court of Delaware County, Iowa, entitled, The Delaware Railroad Construction Company against the Davenport and S't Paul Railroad Company and others, wherein I have been appointed referee, and that I will make a just and true report therein, according to the best of my understanding.

HENRY HARGER.

Signed by Henry Harger, in my presence and by him sworn to before me on this 9th day of February, A. D. 1874.

[SEAL.] JAMES L. STONE,
Notary Public.

63 The foregoing report of Henry Harger having been submitted and examined by me, is approved, and the clerk of the circuit court of Delaware County is directed to enter judgment and decree in accordance with the finding and report of said referee and the minutes made at the January term of the circuit court of Delaware County, in the case of the Delaware Railroad Construction Company against the Davenport and S't Paul Railroad Company and others, to bear date upon February 6, 1874.

Dated this 13th day of February, 1874.

S. BAGG,
Circuit Judge, 9th Judicial District.

Filed February 14, 1874.

G. B. BEVERIDGE, *Clerk.*

And afterwards, to wit, on the 6th day of February, A. D. 1874, it being the 11th day of the regular January term, 1874, of the said circuit court, and on the 14th day of February, 1874, after the close of said term, and in the vacation of said court, the following proceedings were had, done, and entered of record in the proper records of the said circuit court, by the clerk of said court, in words and figures following, to wit:

Petition to enforce mechanics' lien.

THE DAVENPORT RAILROAD CONSTRUCTION Company *vs.* THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson and William Dennison, trustees for certain bondholders of said railroad, the Davenport Railway Construction Company, and Lucius Howard.	No. 1141.

On this 6th day of February, A. D. 1874, this cause came on for hearing upon the defendants' motion for a reference, the plaintiff, the Delaware Railroad Construction Company, appearing by J. M. Brayton, and the defendant, the Davenport and S't Paul Railroad Company, appear-
64 ing by Peters and Heath; and the motion for a reference is overruled, and the court proceeds to receive evidence in the cause,

when, by agreement of the parties, to wit, the plaintiff, and the Davenport and S't Paul Railroad Company, the case as to these parties is referred to Henry Harger, esq., who appears in open court and accepts the appointment of referee, with power to examine witnesses, books, and papers, and accounts, and upon the findings of said referee being reported to the judge of this court, a judgment by agreement of said parties in open court is to be entered of the amount due, and a decree for a mechanics' lien to be made establishing such lien, the hearing to commence on Monday morning, February 9th, 1874, at nine o'clock a. m., at the office of said Harger in Delhi, Iowa, and to continue from day to day until completed. And by said agreement of said parties the judgment to be entered as of the last day of this January term, 1874, of this court, and the cause is, by order of court, continued as to all the defendants except said Davenport and S't Paul Railroad Company.

The said referee having in accordance with said agreement and said order taken the proper oath and proceeded with the hearing and examination of said cause, and having filed his report upon this 14th day of February, 1874, with the approval of said judge, to whom the same had been submitted.

In accordance with said agreement, and the findings of said referee, and the order of said judge, the following judgment and decree is entered.

It is ordered, adjudged, and decreed, that the defendant, the Davenport and S't Paul Railroad Company, pay to said plaintiff the sum of fifty-one thousand nine hundred and thirty dollars and fifty-four cents, and costs of suit, taxed at dollars, the said sum first above mentioned being the sum found by said referee to be due to said plaintiff from said defendant on the said 6th day of February, A. D. 1874, and judgment for said sum and costs is rendered against said defend-
65 ant, the Davenport and S't Paul Railroad Company, and in favor of said plaintiff, to bear interest at the rate of six per cent. per annum.

It is further ordered, adjudged and decreed, that a mechanics' lien be established in favor of said plaintiff upon the following property of the defendant, to wit: The portion of the Davenport and S't Paul Railroad lying between the south line of Delaware County, Iowa, and the north line of said county, as the same is laid and operated, including the right of way to the road-bed, the track, depot building, side tracks and land on which the same are situated, and all fixtures connected with said grounds and building, and all the right, title and interest of said defendant in and to the land upon which said improvements are situated, said lien to date from the 29th (twenty-ninth) day of September, A. D. 1870, and to continue in force against said Davenport and St. Paul Railroad Company, and all persons having or claiming liens or right to said property from said railroad company subsequent to that date, until final payment of said judgment and costs.

It is also ordered, adjudged and decreed said lien be enforced against said property, and that a special execution issue against said property, and that plaintiff have a general execution against any other property of said defendant the Davenport and St. Paul Railroad Company, for the payment of said judgment, costs and accruing costs.

It appearing from the pleadings and the report of the referee that Westphal, Hinds & Co., at the October term of the district court of Delaware County, Iowa, obtained a judgment for work done by S. Denton & Co. for the present plaintiff upon said railroad, and that a me-

chanics' lien be established by said judgment for $2,531.38: It is ordered, adjudged and decreed that in case said Davenport and S't Paul Railroad Company shall pay said judgment of Westphal, Hinds & Co., or any part thereof, such payment shall operate as a payment upon the judgment in this suit; and it appearing from the report of said referee that the stock subscriptions, promissory notes, and taxes
66 mentioned in defendants' answer were not received by F. B. Doolittle, treasurer of plaintiff, it is decreed that plaintiff is not entitled to account therefor, and this cause is continued as to all the defendants except said Davenport and S't Paul Railroad Company.

This decreed this 6th day of February, A. D. 1874.

And afterwards, during the further progress of said cause in said court, and on the 6th day of April, 1874, plaintiff filed in the office of the clerk of the said circuit court an affidavit in words and figures following, to wit:

STATE OF IOWA,
Delaware County, ss:

I, J. M. Brayton, being duly sworn, say that I am attorney for the plaintiff, in the suit pending in the circuit court of Delaware County, Iowa, entitled, The Delaware Railroad Construction Company against the Davenport and S't Paul Railroad Company, John Edgar Thomson and William Dennison, trustees of certain bondholders of said railroad, and other defendants, and that personal service of original notice in said suit cannot be made upon the defendants, John Edgar Thomson and William Dennison, trustees of certain bondholders of said railroad, within the State of Iowa, and they are non-residents of said State of Iowa.

J. M. BRAYTON.

Subscribed to and sworn to by J. M. Brayton before me on this 6th day of April, A. D. 1874.

[SEAL.]

G. B. BEVERIDGE,
Clerk District Court Delaware County, Iowa,
By H. C. HARBERLE,
Deputy.

And afterwards, during the further progress of said cause in said court, and on the 7th day of April, 1874, plaintiff filed in the office of the clerk of said circuit court a supplemental petition, in words and figures following, to wit:

67 *Suplimental petition.*

In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson and William Dennison, trustees for certain bondholders of said railroad and others.

And now comes the plaintiff in this suit and states that since the commencement of this suit, to wit, on the 6th day of February, A. D. 1874, a decree has been rendered by this court against the Davenport and S't Paul Railroad Company, a copy of said decree being hereto annexed and made a part of this supplimental petition, by which judg-

ment was rendered against said railroad company in favor of said plaintiff, for the sum of fifty-one thousand nine hundred and thirty dollars and fifty-four cents, besides costs of suit and the mechanic's lien claimed in the original petition in this suit was established, as claimed in said petition. Wherefore plaintiff asks that the remaining defendants be foreclosed of all rights of redemption of the property described in said original petition; that said lien be established against the remaining defendants in said suit, that it be declared paramount to all claims of said defendant, and that plaintiff have such other and further relief as may be equitable.

J. M. BRAYTON,
Attorney for Plaintiff.

STATE OF IOWA,
Delaware County, ss:

I, A. E. Martin, being duly sworn, say that I am secretary of the company, plaintiff in the above entitled suit, and member of the
68 board of directors of said company, that I have heard said petition, above written, read, and know its contents, and that the statements therein made are true, as I verily believe.

A. E. MARTIN.

Signed by A. E. Martin in my presence, and by him sworn to before me on this 7th day of April, A. D. 1874.

[SEAL.] G. B. BEVERIDGE, *Clerk*,
By H. C. HARBERLE, *Deputy*.

Copy of record mentioned in foregoing petition. Petition to enforce mechanics' lien. Drawn by J. M. Brayton.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson, William Dennison, trustees for certain bondholders of said railroad, The Davenport Railway Construction Company, and Lucius Howard. } No. 1141.

On this 6th day of February, A. D. 1874, this cause came on for hearing, upon the defendant's motion for a reference, the plaintiff, the Delaware Railroad Construction Company appearing by J. M. Brayton, and the defendant, the Davenport and S't Paul Railroad Company, appearing by Peters and Heath, and the motion for the reference is overruled, and the court proceeds to receive evidence in the cause, when by agreement of the parties, to wit, the plaintiff and the Davenport and S't Paul Railroad, the case, as to these parties, is referred to Henry Harger, esq., who appears in open court and accepts the appointment of referee, with power to examine witnesses, books, papers, and accounts, and upon the findings of said referee being reported to the judge of this court, a judgment, by agreement of said parties in open court, is to be entered, of the amount due, and a decree for a mechanic's lien to be made,
69 establishing such lien, the hearing to commence on Monday morning, February 9th, 1874, at 9 o'clock, a. m., at the office of said Harger, in Delhi, Iowa, and to continue from day to day until completed. And by said agreement of said parties, the judgment is to be entered as

of the last day of this January term, 1874, of this court, and the cause is, by order of court, continued, as to all of the defendants, except said Davenport and S't Paul Railroad Company.

The said referee having in accordance with said agreement and said order taken the proper oath, and proceeded with the hearing and examination of said cause, and having filed his report upon this 14th day of February, 1874, with the approval of the said judge, to whom the cause had been submitted, in accordance with said agreement, and the finding of said referee and the order of the said judge, the following judgment and decree is entered: It is ordered, adjudged, and decreed that the defendant, the Davenport and S't Paul Railroad Company, pay to said plaintiff the sum of fifty-one thousand nine hundred and thirty dollars and fifty-four cents, and costs of suit, taxed at dollars; the said sum first above-mentioned being the sum found by said referee to be due to said plaintiff from said defendant on the said 6th day February, A. D. 1874; and judgment for said sum and costs is rendered against said defendant, the Davenport and S't Paul Railroad Company, and in favor of said plaintiff, to bear interest at the rate of six per cent. per annum.

It is further ordered, adjudged, and decreed that a mechanic's lien be established in favor of said plaintiff upon the following property of the defendant, to wit: The portion of the Davenport and S't Paul Railroad lying between the south line of Delaware County, Iowa, and the north line of said county, as the same is laid and operated, including the right of way, the road-bed, the track, depot buildings, side-track, and land on which the same are situated, and all fixtures connected with said grounds and buildings, and all the right, title, and interest of said
70 defendant in and to the land upon which said improvements are situated, said lien to date from the 29th (twenty-ninth) day of September, A. D. 1870, and to continue in force against said Davenport and S't Paul Railroad Company, and all persons having or claiming liens or right to said property from said railroad company subsequent to that date until the final payment of said judgment and costs.

It is also ordered, adjudged, and decreed said lien be enforced against said property, and that a special execution issue against said property, and that plaintiff have a general execution against any other property of said defendant, the Davenport and S't Paul Railroad Company, for the payment of said judgment, costs, and accruing costs.

It appearing from the pleadings and the report of the referee that Westphall, Hinds & Co., at the October term of the district court of Delaware County, Iowa, obtained a judgment for work done by S. Denton & Co. for the present plaintiff upon said railroad, and that a mechanics' lien was established by said judgment for $2,531.38, it is ordered, adjudged, and decreed that in case said Davenport and S't Paul Railroad Company shall pay said judgment of Westphall, Hinds & Co., or any part thereof, such payment shall operate as a payment upon the judgment in this suit; and it appearing from the report of said referee that the stocks, subscription, promissory notes, and taxes mentioned in defendants' answer were not received by F. B. Doolittle, treasurer of plaintiff, it is decreed that plaintiff is not entitled to account therefor. Thus decreed this 6th day of February, A. D. 1874.

STATE OF IOWA,
Delaware County, ss:

I, G. B. Beveridge, clerk of the circuit court of Iowa in and for Delaware County, do hereby certify that the above and foregoing is a true copy and transcript of decree and judgment entry in the action wherein

the Delaware Railroad Construction Company is plaintiff, and the Davenport and S't Paul Railroad Company et al. defendant, as fully
71 as the same appears of record in my office. In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office in Delhi, in said county, this 28th day of March, A. D. 1874.

[SEAL.] G. B. BEVERIDGE, *Clerk*,
By H. C. HARBERLE, *Deputy*.

Filed April 7, 1874.

G. B. BEVERIDGE, *Clerk*.

And afterwards, to wit, on the 5th day of May, 1875, in the further progress of said cause in said court, there was filed in the office of the clerk of said court an affidavit of J. B. Swinburne, publisher, with a copy of original notice attached thereto, in words and figures following, to wit:

STATE OF IOWA,
Delaware County, ss:

I, J. B. Swinburne, being duly sworn, depose and say that I am publisher of the Delhi Monitor, a newspaper published weekly in Delhi, in said county.

And that the notice in the case of Delaware R. R. Construction Co., and the D. and St. P. R. R. Co., a copy of which is hereto attached, was published in said newspaper for official notice for four weeks consecutively, the first publication having been made on the 9th day of April, 1874, and the last on the 30th day of April, 1874.

J. B. SWINBURNE.

Subscribed by J. B. Swinburne, and by him sworn to before me, clerk circuit court in and for Delaware County, Iowa, this 5th day of May, 1874.

Witness my hand and seal the date last above written.

G. B. BEVERIDGE, *Clerk*.
By H. C. HARBERLE, *Deputy*.

Printer's fees	$16 85
Acknowledgment	25
	$17 10

[SEAL.] G. B. B.

72 *Original notice.*

In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
against
THE DAVENPORT AND ST. PAUL RAILROAD Company, John Edgar Thomson, and William Dennison, trustees for certain bondholders of said railroad, The Davenport Railway Construction Company and Lucius Howard.

To the Davenport and St. Paul Railroad Company, John Edgar Thomson, and William Dennison, trustees for certain bondholders of said railroad, The Davenport Railway Construction Company, and Lucius Howard:

You are hereby notified that there is now on file in the office of the

clerk of the circuit court of Delaware County, Iowa, a petition of the Delaware Railroad Construction Company, claiming of the Davenport and St. Paul Railroad Company the sum of fifty-five thousand dollars, ($55,000) as money due upon contract and for work, labor, and services performed and materials furnished in the construction of that portion of the Davenport and St. Paul Railroad, situate in Delaware County, and claiming a mechanics' lien upon all of said portion of said railroad, and asking that said lien be established and enforced upon all of said portion of said railroad, including road-bed, right of way, tracks, culverts, bridges, depot grounds, depot buildings, and all fixtures thereto, as against all of said defendants.

You are also notified that there is on file an amended petition, and a supplemental petition, claiming that judgment and decree has been rendered in this suit on the 6th day of February, A. D. 1874, against said defendants, the Davenport and St. Paul Railroad Company, for the sum of fifty-one thousand nine hundred and thirty dollars and
73 fifty-four cents ($51,930.54) and costs of suit, and establishing said mechanics' lien, as above claimed, and asking that said mechanics' lien be established and enforced against all of said defendants, and that they be barred of all right of redemption of said property above mentioned.

And unless you appear and answer or make defense thereto, on or before noon of the second day of the May term of said circuit court, which will commence at Delhi, on the 18th day of May, A. D. 1874, default will be entered against you, and judgment and decree will be rendered by said court as above claimed, and as asked in said petition.

J. M. BRAYTON,
Attorney for Plaintiff.

Filed May 5, 1875.

G. B. BEVERIDGE, *Clerk.*

And afterwards, during the further progress of said cause in said court, and on the 6th day of May, 1874, the sheriff of Delaware County returned to the clerk of said court the execution before issued in said cause, with the return of his doings under and by virtue of said execution in words and figures following, to wit:

Execution.

STATE OF IOWA,
Delaware County, ss:

The State of Iowa to the sheriff of Delaware County, Iowa, greeting:

Whereas on the 6th day of February, A. D. 1874, in an action pending in the circuit court of Delaware County, Iowa, wherein the Delaware Railroad Construction Company, was plaintiff, and the Davenport and S't Paul Railroad Company and others, were defendants, said court rendered judgment in favor of said Delaware Railroad Construction Company and against said Davenport and S't Paul Railroad
74 Company, for the sum of fifty-one thousand nine hundred and thirty dollars and fifty-four cents debt, besides costs of suit, taxed at $121.30, and also establishing plaintiff's mechanic's lien for said sum upon, and ordered that said lien be enforced against the following described property of said defendant, to wit, all that portion of the Daven-

port and S't Paul Railroad lying between the south line of Delaware County, Iowa, and the north line of said county, as the same is laid and operated, including the right of way, the road-bed, the track, depot buildings, side tracks, and land on which the same are situated, and all fixtures connected with said grounds and buildings, and all right, title, and interest of the said Davenport and S't Paul Railroad Company in and to the land upon which the said improvements are situated:

Now, therefore, you are hereby commanded to cause to be made of the property, goods, and chattels, land and tenements, including the property above described, the said sum of fifty-one thousand nine hundred and thirty dollars and fifty-four cents, debt and interest thereon at the rate of six per cent. per annum, from said 6th day of February, A. D. 1874, and $121.30 costs, together with all legal costs that may accrue by virtue of this writ by levy and sale thereof, according to law.

And have you said sums of money before our said court within seventy days from the date hereof, to render to the said plaintiff, and have you then and there this writ, with your doings hereon.

Witness, G. B. Beveridge, clerk of said court, with the seal thereof hereto affixed, this 17th day of February, A. D. 1874.

[SEAL.] G. B. BEVERIDGE,
Clerk Circuit Court, Delaware County, Iowa.

75 *Sheriff's return of execution.*

STATE OF IOWA,
Delaware County, ss:

I, Abner Dunham, sheriff of Delaware County, Iowa, do hereby certify and return, that the annexed execution came to hand for service on the 17th day of February, A. D. 1874, at 3¼ o'clock p. m.; that on the same day I levied upon the following described property, in Delaware County, Iowa, as the property of the Davenport and S't Paul Railroad Company, to wit: all that portion of the Davenport and S't Paul Railroad lying between the south line of Delaware County, Iowa, and the north line of said county, as the same is laid and operated, including the right of way, the road-bed, the track, depot buildings, side tracks, and land upon which the same are situated, and all fixtures connected with said grounds and buildings, and all the right, title, and interest of the said Davenport and S't Paul Railroad Company in and to the land upon which the said improvements are situated.

And on the 18th day of February, A. D. 1874, I proceeded to advertise for sale, by posting up three notices thereof, one of which was posted on the front door of the court-house in Delhi, that being the place where the last district and circuit courts were held in said county, and one notice in a public place in Oneida Township, and one notice in a public place in Delaware Township, in said county, and by publication thereof, for two consecutive weeks before the day of sale, in a weekly newspaper, printed and published in Delhi, in said county, and called the Delhi Monitor.

That afterwards, to wit, on the 19th day of March, A. D., at 9¼ o'clock a. m., an order was served upon me, a copy of which is hereto annexed, marked "Exhibit A," whereby action in this execution is stayed until further orders. And whereas, on the 4th day of April, A. D.
76 1874, a stipulation in writing was entered into by the parties, agreeing that the plaintiff or sheriff have the right to proceed

with the execution issued without further order from the judge of said court; that said stipulation or agreement was filed in the clerk's office of the circuit court of Delaware County, Iowa, on the 4th day of April, A. D. 1874; and I further certify and return, that by virtue of said execution, and the filing of said stipulation, I did, on the 4th day of April, A. D. 1874, advertise by posting written and printed notices thereof at three public places in said county, one of which was posted on the front door of the court-house in Delhi, where the last district court was held in said county, and one in Milo Township, and one in Oneida Township, in said county, and by causing said notice to be published for two weeks in the Delhi Monitor, a newspaper printed and published in Delhi, in said Delaware County, Iowa; that on the 4th day of May, A. D. 1874, I caused said property to be appraised by two disinterested householders of the neighborhood, one of whom, to wit, W'm Price, was chosen by J. M. Brayton, attorney for plaintiff, and the other, to wit, Albert Booner, was chosen by the officer issuing the writ, who returned to me in writing the appraisement as made by them signed and sworn to; said appraisement bill is hereto annexed, marked "Exhibit B," and made a part of this return; and I further certify and return that on the 4th day of May, A. D. 1874, at ten o'clock a. m., pursuant to said notice, at the front door of the court-house in Delhi, in said county of Delaware, I offered at public auction the depot buildings and depot grounds at the village of Hopkinton, in said county, and no bid was made therefor. And then offered separately the depot buildings and grounds at the village of Delhi, Delaware and Greely, and no bid was made for either of them. I then offered for sale separately each mile of said railroad, commencing at the south line of said county, and no bid
77 was made therefor. I then offered for sale all of said property levied upon, and R. Eddy, treasurer of plaintiff, offered therefor the sum of $53,100, in trust for said plaintiff; and there being no higher bid made at said sale, the same was sold to R. Eddy, treasurer of said Delaware Railroad Construction Co., for the sum of $53,100. And I, on said day, executed to said purchaser a deed of said property, and gave him a certificate of purchase thereof, whereby said writ is partially satisfied. I further certify that the following are the costs accruing on this writ since the same came into my hands, to wit:

Serving execution and mileage	$2 10
Writing notices	2 40
Mileage posting notices	2 00
Notice of sale to defendant	2 40
Notice to choose appraiser	1 60
Appraiser's fees	2 00
Publisher's fees	15 75
Deed	1 00
Sale, 1 day	1 00
Commission	$268 00
	$298 44

ABNER DUNHAM.
Sheriff Delaware County, Iowa.

Filed May 16, 1874.

G. B. BEVERIDGE, *Clerk.*

And afterwards, to wit, on the 18th day of May, A. D. 1874, it being the first day of the regular May term, 1874, of said court, an original

notice with the return of the sheriff of Delaware County, Iowa, and of Scott County, Iowa, shown, was filed in the office of the clerk of said court, the same being in words and figures following, to wit:

78 *Original notice.*

In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
against
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson and William Dennison, trustees for certain bondholders of said railroad, the Davenport Railway Construction Company, and Lucius Howard.

To the Davenport and S't Paul Railroad Company, John Edgar Thomson and William Dennison, trustees for certain bondholders of said railroad, the Davenport Railway Construction Company, and Lucius Howard:

You are hereby notified that there is now on file, in the office of the clerk of the circuit court of Delaware County, Iowa, a petition of the Delaware Railroad Construction Company claiming of the Davenport and S't Paul Railroad Company the sum of fifty-two thousand dollars, as money due upon contract, and for work, labor, and services performed and materials furnished in the construction of that portion of the Davenport and S't Paul Railroad situated in Delaware County, and claiming a mechanic's lien upon all of said portion of said railroad, and asking that said lien be established and enforced upon all of said portion of said , including road-bed, right of way, tracks, culverts, railroad, bridges, depot grounds, depot buildings, and all fixtures thereto, as against all of said defendants.

You are also notified that there is on file an amended petition and a supplemental petition, claiming that judgment and decree has been rendered in this suit, on the 6th day of February, A. D. 1874, against said defendant, The Davenport and S't Paul Railroad Company, for the sum of $51,930.54 and costs of suit, and establishing said me-
79 chanic's lien as above claimed, and asking that said mechanic's lien be established and enforced against all of said defendants, and that they be barred of all right of redemption of said property above mentioned.

And unless you appear and answer or make defense thereto on or before noon of the second day of the May term of said circuit court, which will commence at Delhi on the 18th day of May, A. D. 1874, default will be entered against you, and judgment and decree will be rendered by said court, as above claimed, and as asked in said petition.

J. M. BRAYTON,
Attorney for Plaintiff.

Received this notice April 10, 1874.

H. LEONARD,
Sheriff of Scott Co., Iowa.

STATE OF IOWA,
Scott County, ss:

I hereby certify that on this 10th day of April, A. D. 1874, I served

the within notice upon the within-named defendant, The Davenport Railway Construction Co., by personally reading the same to J. M. Brown, superintendent of said company, and by delivering him a true copy thereof, in the city of Davenport, Scott County, Iowa, the other within-named defendants not being found by me in Scott County, Iowa.

HARVEY LEONARD,
Sheriff of Scott Co., Iowa,
By F. GEISE, *Deputy.*

Service, 50; copy, 50; mileage, 20—$1.20.

STATE OF IOWA,
Delaware County, ss:

I do hereby certify and return that the within notice came to hand for service on the 26th day of April, A. D. 1874, and that, after due search, do return none of the within-named defendants found in my
80 county, except The Davenport and St. Paul Railroad Company, who have been served.

ABNER DUNHAM,
Sheriff Delaware County, Iowa.

Fees: Mileage (40 miles), $2.

And afterwards, to wit, on the 22d day of May, 1874, it being the 5th day of the regular May term, 1874, of the said court, in the further progress of said cause in said court, the following proceedings in said cause were had, done, and entered on record in the proper record of said court, to wit:

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND ST. PAUL RAILROAD Company, John Edgar Thomson, William Dennison, trustees for certain bondholders of said railroad, the Davenport Railway Construction Company, and Lucius Howard.
No. 1141. Equity.

This cause is called for hearing, when, upon motion of plaintiff, the case is dismissed as to the defendant, Lucius Howard, and it appearing to the court, from the inspection of the record and proofs in the case, that the original notice in this case had been served upon the defendants, The Davenport Railway Construction Company, and John Edgar Thomson and William Dennison, trustees for certain bondholders of said railroad, more than ten days previous to the first day of this court, they having failed to answer, are adjudged to be in default. And upon hearing and considering the proofs submitted by plaintiff, the court finds the allegations of the original, amended and supplemental petitions to be true.

It is therefore considered, ordered, and adjudged, that plaintiff have the relief asked for in said petitions, and the mechanic's lien be
81 established as against the above-named defendants, upon the property described in the former decree in this case at the February term, A. D. 1874, and as therein established against said Davenport and St. Paul Railroad Company, and that said defendants be forever barred and foreclosed from all right of redemption of, in or to the

said property, and every part thereof, and that the rights of plaintiff be declared to be superior and paramount to any and all claims or rights of said defendants to the same, or any part thereof.

Thus decreed this 22d day of May, 1874.

Be it further remembered, that afterwards, during the further progress of said cause, in said court, at the January term, A. D. 1875, of said court, on the second day of said term, to wit, on the 26th day of January, 1875, there was filed in the office of the clerk of said court a notice for a new trial of said cause, on behalf of William Dennison, trustee, etc., and the answer of William Dennison, trustee, and with a bond for security for the costs of the re-trial of the said cause, in the words and figures following, to wit:

Motion for new trial.

In the circuit court of Delaware Co., Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.

Now comes William Dennison and shows to the court that he is the surviving trustee in a mortgage executed by the Davenport and S't Paul Railroad Company to John Edgar Thomson and William Dennison, dated 1st July, 1871, and said mortgage was duly recorded in Delaware County, on the 7th day of February, 1872.

That the said Delaware Railroad Construction Company, on
82 the 22nd day of May, 1874, recovered a judgment in this court against said Thomson and this defendant, in which proceedings they were not personally served with process, but the only mode in which said defendants were brought into court was by publication in a newspaper. And said John Edgar Thomson died on the 23d day of May, 1874, and thereupon the said Dennison now comes into court and tenders adequate security for costs in said cause and prays that the said trustee, W'm Dennison, survivor, may have a new trial in said cause.

GRANT & SMITH,
For W'm Dennison.

Filed January 26, 1875.

J. B. SATTERLEE,
Clerk.

In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.

I do hereby enter myself security for costs *for costs* for W'm Dennison, who applies for a new trial in this cause, and acknowledge myself bound to pay all costs which may adjudged against said W'm Dennison,

by reason of the re-trial of said cause or by reason of any order or judgment of the court in relation to costs therein, upon and after the order for a new trial.

JAMES THOMPSON.

Filed January 26, 1875.

J. B. SATTERLEE,
Clerk.

83 In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.

The said defendant, William Dennison, now comes into court and denies each and every allegation of the plaintiff's petition.

And the said defendant in bar of any recovery against this defendant as trustee of the bondholders, says, that on the first day of July, 1871' the said Davenport and S't Paul Railroad Company executed to John Ed' gar Thompson and W'm Dennison a deed of trust, conveying to them al the railroad, railroad track, right of way, and all real and personal prop erty then owned, or thereafter to be owned, by said company, to secure certain bonds therein named, of which over three millions of dollars has been issued and are now owned by bona fide holders, and were so owned when said judgment was recovered against this defendant on 22nd day of May, 1874, and said mortgage was duly recorded in Delaware County on the 1st day of February, 1872.

And said Delaware Railroad Construction Company had constructive notice from that date, and actual notice on the day of its execution, on the 1st day of July, 1871.

And this defendant says that said Delaware Railroad Construction Company performed the work, furnished the materials, and makes the claim of lien against said company, and said trustees, by reason of a written contract set out in the petition filed in said cause, to which agreement reference is hereby made.

84 And by the said contract the said construction company agreed that the payment for the work done under said contract should be paid by the citizens of Delaware county, and at the time of said contract divers citizens of Delaware County had subscribed to the stock of said railroad company, and afterwards, to wit, on the first day of July, 1872, and after said mortgage to the said trustees had been recorded in Delaware County, the said Construction(?) agreed with the Davenport and S't Paul Railroad Company, in consideration of the reduction of the price of the contract two thousand dollars, to waive its rights to have said contract paid for by the citizens of Delaware County, and to take the said Davenport and S't Paul Railroad Company as payer.

And by reason of said premises the said railroad, or any part thereof, or the right of way thereof in Delaware County, and is not entitled to any lien whatever against this defendant.

Wherefore he prays judgment.

GRANT & SMITH,
Attorneys for Dennison.

Filed January 26th, 1875.

J. B. SATTERLEE, *Clerk.*

And on the said second day of the said January term, 1875, of said court, to wit, on the 26th day of January, 1875, as aforesaid, the following proceedings were had, done, and entered, and appear of record in said cause, in the proper records of said court, to wit:

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson, William Dennison, trustees for certain bondholders of said railroad, the Davenport Railway Construction Company, and Lucius Howard. } No. 1141. Equity.

85 Now, on this 26th day of January, 1875, comes William Dennison, the surviving trustee for certain bondholders of the Davenport and S't Paul Railroad Company, who were defendants in the above-entitled cause, and files with the clerk of this court a motion for a new trial in this cause, on behalf of the said William Dennison, surviving trustee as aforesaid, and brings into court a bond for security for costs of retrial of said cause, as required by the statute in such cases made and provided, and offers to be filed the answer of the said surviving trustee, William Dennison. Whereupon it appearing to the court that the service upon the said surviving trustee was by publication only, and that he and those whom he represents are entitled to a new trial under the law; and it further appearing to the court that the said surviving trustee has furnished security for the costs of new trial herein satisfactory to the said plaintiff, it is ordered by the court that a new trial in this cause be granted to the said surviving trustee, William Dennison, that the answer offered by the said defendant be filed, and that this cause stand continued to the next term of this court.

And afterwards, during the further progress of said cause in said court, on the 2nd day of February, A. D. 1875, at the regular January term, A. D. 1875, of said court, and on the 8th day of the said term, there was filed in the office of the clerk of said court a motion, in words and figures following, to wit:

Motion to strike out answer of W'm Dennison, trustee.

In circuit court, Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
against
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.

The said plaintiff comes and moves the court to strike out the answer of William Dennison, trustee, etc.

86 The reason for this motion is that the answer of said William Dennison, trustee, etc., is not verified, although all previous pleadings in said suit are verified, and because of said defect in said answer, said plaintiff moves this court to strike from the files of this court.

J. M. BRAYTON,
Attorney for Plaintiff.

Filed February 2, 1875.

J. B. SATTERLEE, *Clerk.*

And afterwards, during the further progress of said cause in said court, on the 1st day of the regular May term, A. D. 1875, of said court, to wit, on the 17th day of May, 1875, the following proceedings were had, done, and entered of record in the proper records of said court, to wit:

THE DELAWARE RAILROAD CONSTRUCTION Company *against* THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson and William Dennison, trustees for certain bond-holders of said railroad, the Davenport Railway Construction Company, and Lucius Howard.	No. 1141. Equity.

Now, on this 17th day of May, A. D. 1875, this cause comes on for hearing, on motion of plaintiff to strike William Dennison's answer from the files, and after hearing the arguments of the counsel, and the court being fully advised in the premises, it is ordered by the court that said answer be stricken from the files. Whereupon plaintiff files a motion for default against said defendant, William Dennison, for want of answer herein. And afterwards, during the further progress of said cause in said court, on the 19th day of May, A. D. 1875, it being the 3d day of the regular May term, 1875, of said court, the following proceedings were had, done, and entered of record, in the proper record of said court, to wit:

87 THE DELAWARE RAILROAD Construction Company *vs.* THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson, William Dennison, trustees for certain bondholders of said railroad The Davenport Railway Construction Company, and Lucius Howard.	No. 1141. Equity.

Now, on this 19th day of May, A. D. 1875, defendant, William Dennison, asks leave to file an amended answer, and leave is granted by the court to present an amended answer.

And further, on the said 19th day of May, A. D. 1875, it still being on the 3d day of the regular May term, 1875, of said court, the defendant, William Dennison, files in the office of the clerk of said court his amended answer, in words and figures following, that is to say:

Amended answer.

In the circuit court of Delaware Co., Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.

Said defendant, William Dennison, now comes into court, and for answer to the plaintiff's petition states:

That as to the work done and materials furnished by the plaintiff to the D. & S't P. R. R. Co., he has not knowledge nor information sufficient to form a belief, and requires strict proof thereof, and the said defendant in bar of any recovery against him, as trustee for the bondholders of the D. & S't P. R. R. Co., says, that on the first day of July, A. D. 1871, the said D. & S't P. R. R. Co. executed a mortgage to
88 or deed of trust to John Edgar Thomson and William Dennison, conveying to them all the railroad, right of way, and property of every description then owned, or thereafter to be owned by said company, to secure certain bonds therein named, of which over three millions of dollars have been issued, and are now owned by bona fide owners, and were so owned when said judgment was recovered against said defendant on the 22nd day of May, A. D. 1874, and said mortgage was duly recorded in the office of the recorder of Delaware County, on the 7th day of February, 1872, that said Delaware R. R. Construction Company had constructive notice from that day, and actual notice on the day of the execution of said mortgage, to wit, on the first day of July, 1871.

And this defendant says that said Delaware R. R. Const. Co. performed the work, furnished the materials, and makes the claim of lien against said company and said trustees, by reason of a written contract set out in the petition filed in said cause, to which agreement reference is hereby made.

And by the said contract the said construction company agreed that the work done and materials furnished under said contract, should be made by the citizens of Delaware county, and afterwards, to-wit, on the first day of July, 1872, and after said mortgage to the said trustees had been recorded in Delaware County, the said D. & S't P. R. R. Co. agreed with the said Delaware R. R. Cons. Co., in consideration of the reduction of the price of the contract two thousand dollars, to waive its rights to have the work done under said contract to be paid for by the citizens of Delaware County, and to allow said Delaware R. R. Cons. Co. to look to the said D. & S't P. R. R. Co. as the payer.

And by reason of said premises the said Delaware R. R. Construction Company is not entitled to any lien upon said R. R., or any part
89 thereof, as against this defendant and the bondholders he represents. Wherefore he prays judgment.

WILLIAM DENNISON,
By GRANT & SMITH,
His Attorneys.

STATE OF IOWA,
Delaware County, ss:

I, L. M. Fisher, on oath say that I am acting as attorney for W'm Dennison, trustee for the bondholders in said cause; that I am acquainted with the facts upon which the foregoing answer is founded, and that the allegations therein made are true, as I verily believe.

L. M. FISHER.

Subscribed by L. M. Fisher, and by him sworn to in my presence this 19th day of May, A. D. 1875.

[SEAL.]

J. B. SATTERLEE,
Clerk Circuit Court.

Filed May 19th, 1875.

J. B. SATTERLEE, *Clerk.*

And afterwards, on the said 19th day of May, A. D. 1875, during the further progress of said cause in said court, it being on the third day of

the regular May term, A. D. 1875, of said court, there was filed in the office of the clerk of said court a paper in the words and figures following, to wit:

In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY
vs.
W'M DENNISON, SURVIVING TRUSTEE.

Now comes Lewis H. Meyer and moves to be substituted as a codefendant in the above entitled cause, and states to the court:

1. That on the 1st day of July, A. D. 1871, there was executed
90 and delivered, by the Davenport and S't Paul Railroad Company to W'm Dennison, a citizen and resident of the State of Ohio, and John Edgar Thomson, a resident and citizen of the State of Pennsylvania, a certain deed or indenture on the property, rights, and franchises of the said railroad company, for the purpose of securing certain bonds issued by said company.

2. That since the delivery and execution of said indenture, to wit, on the 22d day of May, A. D. 1874, John Edgar Thomson, one of the trustees of said mortgage, departed this life.

3. That on the same day aforesaid, to wit, on the first day of July, A. D. 1871, the said Davenport and S't Paul Railroad Company made, executed, and delivered to said John Edgar Thomson and W'm Dennison a certain other deed of trust, by way of supplement, which provides, among other things,

"That in case, any time hereafter, the said trustees, or either of them, or any trustee hereinafter appointed, shall die or resign, or be removed as herein provided, a successor to such trustee shall be appointed by the holders of a majority in interest of the total amount of said bonds."

4. That, in accordance with said supplemental indenture, and after the death of said John Edgar Thomson, by an instrument in writing, duly executed by a requisite number of such bondholders, your petitioner was, on the day of duly appointed a trustee of the mortgage or deed of trust heretofore mentioned, in place of John Edgar Thomson, deceased.

Wherefore your petitioner prays he may be substituted as a codefendant in said suit.

LEWIS H. MEYER,
By GRANT & SMITH,
His Attorneys.

Filed May 19, 1875.

J. B. SATTERLEE, *Clerk.*

91 And on the same day, to wit, on the 19th day of May, A. D. 1875, during the further progress of said cause in said court, and on the said 3rd day of the regular May term, 1875, of said court, a paper was filed with the clerk of said court in the words and figures following; that is to say:

Pete. to transfer case to U. S. cir. court.

In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
LEWIS H. MEYER AND W'M DENNISON, TRUSTEES.

Now comes your petitioners, Lewis H. Meyer and W'm Dennison, trustees, and state:

That the Delaware Railroad Construction Company and all persons who have come in as intervenors in the above-entitled cause are citizens of the State of Iowa; that Lewis H. Meyer is a citizen of the State of New York, and *and* William Dennison a citizen of the State of Ohio.

That they have reason to believe and do believe that from prejudice or local influence they will not be able to secure justice, by reason of such prejudice or local influence.

That said cause can be fully and finally determined in the United States circuit court for the district of Iowa.

That the amount in controversy in said cause amounts to more than the sum of five hundred dollars, exclusive of costs, and they make and file in this circuit court a bond with good and sufficient security for their entering in such circuit court, on the first day of its next session, a copy of the records in said suit and for paying all costs that may be awarded by said circuit court, if said court shall hold that said suit shall
92 be wrongfully or improperly transferred thereto, and also for the appearing and entering special bail in such suit, if such special bail was originally requisite therein, and they pray of said court to accept said petition and bond, and order the transfer the said cause to the said circuit court of the United States.

Filed May 19th, 1875.

J. B. SATTERLEE, *Clerk.*

And afterwards, on the 20th day of May, A. D. 1875, during the further progress of said cause in said court, it being on the 4th day of the regular May term, A. D. 1875, of said court, there was filed in the office of the clerk of said court a paper in the words and figures following; that is to say:

In the circuit court of Delaware County, Iowa.

Know all men by these presents that we, Lewis H. Meyer and W'm Dennison, principals, and John E. Henry and Charles Whittaker, as sureties, are held and firmly bound unto the Delaware Railroad Construction Company, and all other persons whom it may concern, in the penal sum of one thousand dollars, to which payment we bind ourselves, and each of us, by these presents.

Given under our hands this 15th day of May, 1875.

The conditions of this obligation are these:

The said Lewis H. Meyer and W'm Dennison have applied to the circuit court of said county to remove a certain cause pending in said court wherein the Delaware Railroad Construction Company are plaintiffs and the said Lewis H. Meyer, trustee, successor to John Edgar Thomson and William Dennison, trustees, and many others are defend-

ants, from the said circuit court to the circuit court of the United States for the district of Iowa.

Now if said Meyer & Dennison shall enter in the said circuit court of the United States for the district of Iowa, on the first day of
93 next term thereof, a copy of the record of said suit, and shall pay all the costs that may accrue or be awarded by said circuit court, if it shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said circuit court in said suit, if special bail was originally required therein, then this obligation shall be void; otherwise in full force.

W'M DENNISON & L. H. MEYER,
Trustees.
By GRANT & SMITH,
Their Attorneys.

C. WHITAKER,
JOHN E. HENRY,
Sureties.

Surety approved with this bond this day of May, A. D. 1875.

Judge of the Delaware Circuit Court.

I hereby certify that I am a resident and citizen of the State of Iowa, that I am worth double the amount herein intended to be secured, beyond the amount of my debts, and have property liable to execution equal to the sum herein secured.

C. WHITAKER.

Subscribed by and sworn to by said C. Whitaker, before me, this 15th day of May, A. D. 1875.

[SEAL.]

W. M. KAEISER,
Notary Public, Scott County, Iowa.

Filed May 20th, 1875.

J. B. SATTERLEE,
Clerk.

And on the same day, to wit, on the 20th day of May, 1875, it being the 4th day of the regular May term, 1875, of said court, defendant, William Dennison, trustee, filed in the office of the clerk of said court his affidavit and motion for continuance in words and figures following, viz:

94 *Motion for continuance.*

In circuit court, Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.

Now comes William Dennison, trustee, etc., one of the defendants in the above-entitled cause, and moves the court for a continuance in the above-entitled cause upon the within affidavit, and asks the court until the next term of said court to file his answer herein.

W'M DENNISON,
By GRANT & SMITH AND
L. M. FISHER,
His Att'ys.

I, L. M. Fisher, on oath state that I am, as attorney for William Dennison, trustee for the bondholders of the Davenport and S't Paul Railroad Company, in the case of the Delaware R. R. Const. Co. vs. the said D. & S't P. R. Co.; that the failure to have the answer of the said Dennison in the said cause properly sworn to was an oversight upon the part of the attorneys of the said trustee and bondholders in said cause; that I have charge of said cause, as to the said trustee, in this court; that I was unable to be present upon the first day of this term and to make the proper appearance and answer in said cause; that the said W'm Dennison, as trustee, has a good defense to the action of the Delaware R. R. Const. Co., in this, that the said Delaware R. R. Con. Co. had actual notice of a mortgage from and after the first of July, 1871, which said mortgage was executed upon all the property of every description of the said D. & S't P. R. R. Co., which said mortgage was executed to John Edgar Thomson and William Dennison, and that all work done and materials furnished constitute only a subsequent and inferior lien after said date to the
95 said mortgage. The said mortgage was recorded in the county of Delaware on the 7th day of February, A. D. 1872, and that from said date said Delaware R. R. Const. Co. had constructive notice of said mortgoge, and that by far the larger portion of the said labor and materials alleged to have been furnished to the Davenport & S't P. R. R. Co. were furnished subsequent to the execution and recording of said mortgage, as aforesaid. That the said Delaware R. R. Const. Co. performed the work, furnished the materials as makes the lien against said D. & S't R. R. Co., and said trustee, by reason of a written contract set out in the petition filed in said cause, and by said contract the said construction company agreed that the payment for the work done should be made by the citizens of Delaware County, and that at the time of said contract divers citizens of said Delaware County had subscribed to the capital stock of said D. & S't P. R. R. Co., and afterwards, to wit, on the 1st day of July, 1872, and after the recording of the said mortgage in Delaware County, the said Delaware R. R. Construction Company agreed with the Davenport & S't P. R. R. Co., in consideration of the reduction of the price of the contract of two thousand dollars, should have the work and materials furnished under said contract paid for by the citizens of Delaware County, and to take the said D. & S't P. R. R. Co. as the payer. The said William Dennison, surviving trustee for the bondholders, resides in the city of Washington, and it would be impossible to communicate with *by* him by mail in less than one week from this date. That this application is not made for delay, but in the utmost good faith, and for the purpose of furthering justice in said cause.

L. M. FISHER.

96 STATE OF IOWA,
Delaware County, ss:

Subscribed and sworn to by the said L. M. Fisher in my presence this 20th day of May, A. D. 1875.

[SEAL.] J. B. SATTERLEE. *Clerk.*
By J. N. SULLIVAN, *Deputy.*

Filed May 20th, 1875.

J. B. SATTERLEE, *Clerk.*

And afterwards, on the same day, to wit, the 20th day of May, A. D. 1875, during the further progress of said cause in said court, and on the said 4th day of the regular May term, A. D. 1875, of said court, the fol-

lowing proceedings were had, done, and entered of record in the proper records of said court, to wit:

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson, William Dennison, trustees for certain bondholders of said railroad, the Davenport Railway Construction Company, and Lucius Howard. } No. 1141. Equity.

Now, on this 20th day of May, A. D. 1875, this cause coming on for hearing on the motion of plaintiff to strike from the files in this cause the amended answer of William Dennison, trustee, the same is submitted to the court upon arguments of counsel, and the court being fully advised in the premises, said motion is sustained. Whereupon, defendants, by their attorneys, file a motion for a continuance of this cause, and asks for time to file an amended answer. Whereupon plaintiff files his objections to defendants' affidavit for a continuance, alleging want of diligence on the part of said defendant, and that no excuse or reason for such want of diligence is shown. Objection to defend-
97 ants' affidavit for continuance sustained, and motion for continuance overruled. Whereupon defendant, William Dennison, files his amended answer.

And on the same day, to wit, on the 20th day of May, 1875, it being still on the 4th day of the regular May term, 1875, of said court, defendant William Dennison files this amended answer in said cause, in words and figures following, viz:

STATE OF IOWA,
Delaware County, ss:

I, L. M. Fisher, being duly sworn, depose and say that I am one of the attorneys for W'm Dennison, trustee, etc., and defendant in the above entitled cause.

That I have examined the records upon which the foregoing allegations are made. That I am personally acquainted with the facts alleged in said answer.

The said allegations, except as to actual notice, are based upon written instruments, recorded in this Delaware County, and on file in this cause, which said instruments, on file in this cause, and in the recorder's office of said county, I have examined, and have personal knowledge of their contents.

All of which are true.

L. M. FISHER.

Subscribed and sworn to by said L. M. Fisher, before me this 20th day of May, 1875.

[SEAL.]

J. B. SATTERLEE, *Clerk.*
By I. N. SULLIVAN, *Deputy.*

In the circuit court of Delaware Co., Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.

Said defendant, William Dennison, now comes into court, and for answer to the plaintiff's petition, states:

98 That the said defendant, in bar of any recovery against him, as trustee for the bondholders of the D. & S't P. R. R. Co., says, that on the 1st day of July, A. D. 1871, the said D. & S't P. R. R. Co. executed a mortgage or deed of trust to one John Edgar Thomson and William Dennison, conveying to them all the railroad, right of way, and property of every description, then owned or thereafter to be owned by said company, to secure certain bonds therein named, of which over three million dollars have been issued, and are now held by bone fide owners, and were so owned when said judgment against the defendant, the D. & S't P. R. R. Co., was recovered on the 22d day of May, A. D. 1874, and said mortgage was duly recorded in the office of the recorder of Delaware County, on the 7th day of February, 1872.

That said Delaware R. R. Con. Co. had constructive notice from that day, and had actual notice thereof on the day of the execution of said mortgage, to wit, on the 1st day of July, A. D. 1871.

And this defendant says that the Delaware R. R. Const. Co. performed the work, furnished the material, and makes the claim of lien against said company and said trustee by reason of a written contract set out in the petition filed in said cause, to which reference is hereby made.

And by the said contract, the said construction company agreed that the work done and materials furnished under said contract should be made by the citizens of Delaware County. And afterwards, to wit, on the first day of July, A. D. 1872, and after said mortgage to said trustee had been recorded in Delaware County, the said D. & S't P. R. R. Co. agreed with said Delaware R. R. Const. Co., in consideration of the reduction of the price of the contract two thousand dollars ($2,000) to waive its right to have the work done under said contract, to be paid for by the citizens of Delaware County, and to allow said

99 Delaware R. R. Const. Co. to look to the said D. & S't P. R. R. Co. as the payee.

And by reason of said premises, the said Delaware R. R. Const. Co. is not entitled to any lien upon said R. R., or any part thereof, as against this defendant and the bondholders he represents.

Wherefore, he prays judgment, with the costs of this suit.

WILLIAM DENNISON,
By GRANT & SMITH AND
L. M. FISHER,
His Attorneys.

Filed May 20, 1875.

J. B. SATTERLEE, *Clerk*,
By I. N. SULLIVAN, *Deputy.*

And afterwards, to wit, on the 21st day of May, A. D. 1875, during the further progress of said cause in said court, it being the 5th day of the regular May term, A. D. 1875, of said court, there was filed in the

office of the clerk of the said court the following affidavit, in words and figures following, to wit:

In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company.
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.

In the matter of the petition of Lewis H. Meyer.

I, L. M. Fisher, on oath, say that I am an attorney for Lewis H. Meyer, trustee for the bondholders of the Davenport and S't Paul Railroad Company; that I know the facts upon which said petition is
100 based, and that the allegations therein made are true; that I have obtained this knowledge from the examination of the several mortgages of the D. and S't Paul Railroad Company in said petition mentioned, and also from an examination of certain correspondence of the said Meyer, wherein he alleged his appointment in the manner set forth in said petition; that the said Meyer is the duly appointed trustee of the Davenport and S't Paul Railroad Company's said mortgage, and as the successor of John Edgar Thompson, deceased, has, upon a proper showing, been allowed to come in as a co-plaintiff in the U. S. circuit court for the district of Iowa, in a case wherein Moses Dewett Loomis is plaintiff and the Davenport and S't Paul R. R. Company, among others, a defendant, which suit was brought for the foreclosure of the said mortgage; and that, as such trustee, said Meyer has filed a bill for the foreclosure of the aforesaid mortgage in said court.

And further, that the death of John Edgar Thomson is a matter of public notoriety, and well known to all persons acquainted with public affairs.

L. M. FISHER.

Sworn to and subscribed before me and in my presence this 21st day of May, 1875, by the said L. M. Fisher.

[SEAL.] J. B. SATTERLEE, *Clerk*,
By I. M. SULLIVAN, *Deputy*.

NOTE.—This affidavit was not certified by the clerk at the date purported, and was passed to the judge with the other papers in the cause, without the clerk's certificate; but on the return of the papers, with the decision of Judge Bagg, M'r Attorney Fisher claimed that he swore to said affidavit May 21st, 1875, before deputy clerk Sullivan, who, satisfied that such had been the case, at the request of said Fisher, certified as above.

Witness my hand and seal this 9th day of August, 1875.

[SEAL.] J. B. SATTERLEE, *Clerk*.

Filed May 21st, 1875.

J. B. SATTERLEE, *Clerk*.

101 And afterwards on the same day, to wit, on the 21st day of May, A. D. 1875, during the further progress of this cause in said court, and on the said 5th day of the regular May term, A. D. 1875, there was filed in the office of the clerk of said court a paper in words and figures following, that is to say:

Objections to transfer to .

In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
against
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.

1. It is too late after one trial to remove the cause to the U. S. circuit court and after one term has passed at which the cause could be tried, after a second trial has been allowed.
2. The application is made by motion and not by petition.
3. The security is not good and sufficient security for the purpose of removal.
4. It is too late after the cause has been reached and the trial has commenced.

J. M. BRAYTON,
Attorney for Plaintiff.

Filed May 21, 1875.

J. B. SATTERLEE, *Clerk.*

And afterwards, on the same day, to wit, on the 21st day of May, A. D. 1875, during the further progress of this cause in said court, and on the 5th day of the regular May term, 1875, there was filed in the office of the clerk of said court a paper, in words and figures following, to wit:

102 Delaware circuit court, May term, 1875.

THE DELAWARE R. R. CONSTRUCTION *Construction.*
vs.
THE DAVENPORT AND S'T PAUL RAILWAY Company and others.

Now comes W'm Dennison and prays leave to amend his answer filed in this cause and to set up in bar of the recovery or judgment of the plaintiff in this cause, amend by stating the following facts:

1. That a judgment was recovered in this cause in this court, on the 6th of Feb., 1874, that said Thomson, deceased, and Dennison were named as defendants in said petition, and no judgment was rendered against them, nor were they served with process in any way.
2. That after said recovery of 6 Feb., 1874, an execution was issued against the defendants, served with process, the property sold, and execution returned satisfied prior to 22d May, 1874.
3. That after said judgment and said sale, and after said cause was tried and end (?) the said plaintiffs made a newspaper publication against Thomson and Dennison without any pleadings whatever, and on 22 May, 1874, took a judgment in this court, which barred their right to redeem the property, on a judgment already rendered and sold on it, without any pleadings of any kind, and there was no petition before the court as against Thomson or Dennison, on which any proceedings could be had or any judgment rendered, and the judgment against them

on 22 May, 1874, on which a new trial is granted, is coram non judice, without any warrant of law, and utterly void and of no effect or validity, and this court could not then or now enforce it, and they pray it may be set aside.

GRANT & FISHER,
For Dennison.

103 Sworn to and subscribed by James Grant, who swears that he is the attorney of the defendant and knows the facts in this amended answer to be true, by examining the records referred to.

JAMES GRANT.

Subscribed and sworn to before me and in my presence by the said James Grant, this 22 day of May, 1875.

[SEAL.] J. B. SATTERLE,
Clerk Circuit Court.

Filed May 22d, 1875.

J. B. SATTERLEE, *Clerk.*

And on the same day, to wit, May 21st, A. D. 1875, and during the further progress of said cause in said court, and on the said 5th day of the regular May term, A. D. 1875, there was filed in the office of the clerk of said court, a paper in words and figures following, that is to say:

Reply.

In circuit court, Delaware County.

THE DELAWARE RAILROAD CONSTRUCTION Company *against* THE DAVENPORT & S'T PAUL RAILROAD COMpany and others.

The plaintiff, for reply to the answer of William Dennison, trustee, denies that said Davenport and S't Paul Railroad Company made, executed and delivered any valid mortgage of said railroad property; denies that said plaintiff ever took the *the* citizens of Delaware County as payer or payees of their said contract.

Plaintiff denies that it agreed that the work and materials furnished under said contract should be made by the citizens of Delaware County. And plaintiff says that the mortgage recorded, as alleged in said answer was wholly void; that the authorized capital stock of said Davenport and S't Paul Railroad Company did not exceed the sum of three
104 millions of dollars, and that the whole amount of capital stock of said railroad company subscribed was and is less than one million of dollars; that said railroad company was never authorized or empowered to execute a mortgage for the sum of three millions, or for any sum exceeding two millions of dollars.

Wherefore plaintiff asks that the original judgment in this case be confirmed, and for costs of suit.

J. M. BRAYTON,
Attorney for Plaintiff.

STATE OF IOWA,
Delaware County, ss:

I, Ancil E. Martin, being duly sworn, say that I have read the foregoing reply and know its contents. That I am secretary of plaintiff, and that the matters and things therein set forth are true, as I verily believe.

ANCIL E. MARTIN.

Subscribed and sworn to before me this 21st day of May, 1875.
Witness my hand and official seal the said date.
[SEAL.] J. B. SATTERLEE,
Clerk Circuit Court.

Filed May 21, 1875.

J. B. SATTERLEE, *Clerk.*

And afterwards, on the 22nd day of May, A. D. 1875, and during the further progress of said cause in said court, it being on the 6th day of the regular May term, A. D. 1875, of said court, there was filed in the office of the clerk of said court, a paper in words and figures following, that is to say;

In the circuit court of Delaware Co., Iowa, May term, 1875.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company and others.

105 Now, on this 22d day of May, 1875, comes Lewis H. Meyer, successor to John Edgar Thomson, and William Dennison, surviving trustee of the bondholders under the deed of trust or mortgage referred to in said cause, and show to the court that on January 26, 1875, said William Dennison, gave security for costs and filed a petition in this court to re-try this cause, and this court, at that term and time, ordered a re-trial of this cause and judgment as to W'm Dennison, and allowed his answer to be filed, and on the day of the filing thereof, ordered a continuance of this cause.

And on the third day of this term the said Dennison and Meyer filed a petition with a bond, with good and sufficient security, according to the act of Congress for the transfer of this cause to the circuit court of the United States for the district of Iowa, said Dennison being a citizen of Ohio and Meyer a citizen of New York. And this court having overruled said application to transfer said cause and proceeding to the trial of the same, now said Dennison and Meyer, and each of them, protest against the trial of this cause, and ask of this court to accept said petition and bond, and proceed no farther with the trial of this cause, and if any objection is made in this court to the sufficiency of the security for the transfer, said Dennison and Meyer, and each of them, offer to give any further and additional security in that respect, or to deposit with this court such sum of money as will be ample to answer all the costs and other duties required of them for the transfer of the same.

GRANT & FISHER,
For the said Dennison and Meyer.

I, James Grant, state, on oath, that I am one of the attorneys of the said Meyer and Dennison, and that I know the facts set forth in this motion by reading and examining the records and papers in the cause, and that I am authorized to give all the security for costs in this
106 cause, and have the money in my possession to deposit the same with the court if required.

JAMES GRANT.

Subscribed and sworn to before me, and in my presence, by the said James Grant, this 22d day of May, 1875.

[SEAL.] J. B. SATTERLEE,
Clerk Circuit Court.

Filed May 22, 1875.

J. B. SATTERLEE, *Clerk.*

Be it further remembered that afterwards, to wit, on the 31st day of May, A. D. 1875, in the vacation of said court, his honor S. Bagg, judge of said court, filed with the clerk of said court his written findings and judgment said cause, in words and figures following, to wit:

In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT & S'T PAUL RAILROAD Company and W'm Dennison, trustees for certain bondholders.

This action was tried as to the railroad company upon an appearance and hearing, and a judgment rendered for the sum of $. As to the defendant, William Dennison, trustee, a judgment was rendered by default, notice having been served by publication. At a subsequent term of said court the default was set aside as to Dennison, and a retrial ordered as to said trustee. After said setting aside by default the said cause was by consent continued. And now, at this May term of this court, on the first day thereof, the plaintiff moves that the answer of said defendant Dennison be stricken from the docket for want of
107 verification. Motion sustained and leave granted to file amended answer. Amended answer filed, and parties announce themselves ready for trial.

Whereupon the plaintiff offers in evidence the contract between the parties, after which defendant asked leave to file a motion and bond for change to U. S. circuit court.

Application denied, as the motion should have been made at the last term of the court, and the court having commenced the trial, it was too late. Defendant excepted to the ruling, whereupon the court proceeded to hear the cause, after which the defendant, by James Grant, his attorney, moved the court to discontinue further proceeding in the cause, and to transfer to U. S. circuit court, which was refused. Def't excepts.

Whereupon the court, upon hearing, find the equity of the case is with the plaintiff, and that the lien of said plaintiff is prior to the claim of defendants' trustee, and order that decree shall be entered up accordingly.

See decree.

S. BAGG, *Circuit Judge.*

Filed May 21, 1875.

J. B. SATTERLEE, *Clerk*

Whereupon the clerk of said court, in accordance with the findings and judgment of his honor Judge Bagg, aforesaid, and the orders and proceedings before had in the trial of said cause, made and entered of record, in the proper records of said court, an entry of judgment and decree in said cause, in words and figures following, to wit:

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson, and William Dennison, trustees for certain bondholders of said railroad, The Davenport Railway Construction Company, and Lucius Howard. } No. 1141. Equity.

On this 21st day of May, A. D. 1875, this cause was called for
108 hearing, when Lewis H. Meyer asks leave to be made a defendant in this case. No sufficient evidence of his appointment as trustee being produced, his application is overruled.

Plaintiff introduces in evidence the contract described in petition. Defendant asks leave to file an amended petition and bond for removal to U. S. circuit court. Plaintiff objects that it is too late; should have been made before; and cause now reached and on trial. Objection sustained by the court.

Defendant excepts. Defendant offers bond on file.

Plaintiff files objection to application to transfer cause to U. S. circuit court. Shows that one surety on the bond is an attorney, and objects to him, and that the bond is not good or sufficient, and filed too late. Objection sustained.

Defendant asks for time to present a new bond. Plaintiff objects. Time refused by the court. Defendant excepts. With leave of court, plaintiff files a reply. Defendant objects and excepts to filing the reply. Court adjourns to May 22.

On this May 22, 1875, defendant files a motion that the court proceed no further with the cause, but allow defendant time to file a new bond, or deposit security for costs. Motion overruled. Defendant excepts and asks leave to file an amendment to his answer. Leave is granted, and the defendant, William Dennison, trustee, files an amendment to his former answer. Trial proceeds upon the issue made, J. M. Brayton, esq., appearing for the plaintiff, and Grant and Fisher for William Dennison, trustee, etc. After both parties had introduced their evidence and rested, and the cause submitted, by consent of parties in open court, it is agreed that the court may take the case under advisement, and that upon the filing of his decision, although in vacation, judgment and decree shall be rendered and entered as of this May term of this court.

And the court finds the issues in favor of plaintiff, and
109 files and renders his decision, that plaintiff's lien is paramount to that of defendant's, and orders judgment in favor of said plaintiffs.

It is therefore ordered and adjudged and decreed that the lien of said plaintiff is paramount to that of the defendant, William Dennison, trustee, etc., and it is ordered, adjudged, and decreed that the former decree and judgment of this court, rendered at the May term, A. D. 1874, be confirmed, and that the plaintiff's claim for a mechanic's lien, as prayed in his petition, be established as against the said defendants, upon the property described in the decree in this suit, at the February term of this court, 1874, and as therein established against the Davenport

and S't Paul Railroad Company, and that the defendants be forever barred and foreclosed of and from all right of redemption of, in, or to said property and every part thereof, and that the rights of plaintiff be declared to be superior and paramount to any and all claims and rights of said defendant to the same or any part thereof, and that the defendant, William Dennison, trustee, etc., pay the costs of the retrial of this suit. Thus decreed this 22d day of May, A. D. 1875.

And afterwards, on the 5th day of July, A. D. 1875, there was filed in the office of the clerk of said court a "notice of appeal," in words and figures following, to wit:

Circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company and others. } No. 1141.

To the above-named plaintiff or J. M. Brayton, its attorney, and J. B. Satterlee, clerk of said court:

You are hereby notified that William Dennison, trustee, a de-
110 fendant in said cause, has appealed from the judgment and decree of the said circuit court of Delaware County, rendered in favor of the said plaintiff, on the 22 day of May, A. D. 1875, to the supreme court of the State of Iowa, and that said appeal will come on for hearing and trial at the regular term of said supreme court, to be held at Dubuque, Iowa, commencing on the third (3) Monday in October, A. D. 1875.

GRANT & SMITH AND L. M. FISHER,
Att'ys for said Def'ts.

Due and legal service of the within and foregoing notice accepted this 30 day of June, A. D. 1875.

J. B. SATTERLEE,
Clerk Circuit Court.

I hereby certify and return that the within notice came to hand for service June 30th, 1875, and that on the 3rd day of July, 1875, I served the same on J. M. Brayton, att'y for Delaware Railroad Construction Company, by delivering to him personally a true copy thereof; he at the same time waived reading of this original. Done at Delhi, Delaware County, Iowa.

ABNER DUNHAM,
Sheriff Delaware County, Iowa.

Fees: Service, 50; copy, 20; mileage, 10=$.80.

Filed July 5, 1875.

J. B. SATLERLEE, *Clerk.*

And afterwards, on the 21st day of July, 1875, there was filed in the office of the clerk of said court a stipulation or admission and facts in evidence in said cause in words and figures following, to wit:

It is admitted by counsel for the plaintiff in open court that the firs+

amendment to the articles of incorporation of the Davenport and S't Paul R. R. Company, changing the principal place of business
111 from Delhi to Davenport, Iowa, was recorded with the recorder of Scott County, Iowa, and with the secretary of state prior to the execution of the mortgages to Dennison and Thompson, trustees.

And it is also admitted that the sixth amendment to said articles of incorporation, changing the amount of capital stock of said company, was recorded with the recorder of Scott County, Iowa, on the 2nd day of December, 1871, and with the secretary of state of Iowa on the 19th day of December, 1871, but no amendment to any of the articles of incorporation was recorded in the office of the recorder of Delaware County, Iowa.

J. M. BRAYTON,
For Plaintiff, the Delaware Railroad Construction Company.

Filed July 21, 1875.

J. B. SATTERLEE, *Clerk.*

And afterwards, to wit, on the 24th day of August, 1875, in the archives of said court there was filed in the office of the clerk of said court a paper, in words and figures following, that is to say:

STATE OF IOWA,
Delaware County, ss:

I hereby certify and return that the annexed motion came to hand for service on the 24th day of August, A. D. 1875, and that on the same day I served the same on J. M. Brayton, attorney for the Delaware Railroad Construction Company, by delivering to him personally a true copy thereof, he at the same time waived reading of the original. Done in Delhi Township, Delaware County, Iowa.

ABNER DUNHAM,
Sheriff Delaware County, Iowa.

Fees: Service, 50; mileage, 10; copy, 1.40—$2.00.

112 In the circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY
against
THE DAVENPORT & S'T PAUL RAILROAD COMPANY and others.

Now comes William Dennison and moves the court for a correction of the record and decree in said cause and for a stay of judgment therein, and for cause thereof states, that said judgment and decree do not state correctly the proceedings in said cause.

That on the calling of this cause, on the 21st day of May, 1875, the petition of Lewis H. Meyer, asking to be made a co-defendant, was immediately brought to the attention of the court for its consideration. That as soon as the counsel for this defendant could be heard after the refusal of the court to grant the application made in said petition, the said defendant asked leave to amend his petition and bond for removal of cause to United States circuit court, so as to make said petition and bond comply with the said ruling of the court. That prior to this time and on the 19th day of May, 1875, the said petition and bond for the

removal of said cause had been placed on file with the clerk of this court. That at the time of the refusal of the court to grant the application of Meyer as aforesaid, and at the time of the offering by plaintiff of the contract in said decree named in evidence, the trial of this cause on its merits had not begun. That the defendants' petition and bond being on file were entitled to the consideration of the court previous to the trial of said cause on its merits. That at that time said contract could not be received in evidence. That the offering of the same
113 at that time should not appear on the record. That the defendant immediately upon the overruling of his application for leave to answer said petition and bond called up for hearing his application upon the petition and bond there, then filed for a transfer of said cause to the United States circuit court. That upon the consideration by the court, the petition and bond, the said court held that the petition and bond had been filed too late. That said petition and bond should have been filed at the last term, and that the surety on said bond was not sufficient, and the bond was void, one of the sureties being an attorney at law. That the trial of said cause on its merits did not begin until the overruling of defendants' application for further time and leave to file new bond therein. That the facts aforesaid do not sufficiently appear by the said record and decree. That this correction herein asked for is material to the rights of this defendant and this motion is not made for delay.

And this defendant therefore moves the court to amend and correct the said decree, so that, beginning with the application of Lewis H. Meyer to be made co-defendant in said cause, it may read as follows, to wit:

"On the 21st day of May, 1875, this cause coming on to be heard, Lewis H. Meyer, through his attorneys, Grant & Smith and L. M. Fisher, called up for hearing his petition to be made a co-defendant in said cause. The court then overruled the application therein made for want of sufficient evidence of the appointment of said Meyer as trustee, to which ruling defendant and Meyer excepted. Defendant then asks leave to amend his petition and bond for transfer of this cause to the United States circuit court. Plaintiff objects; application too late, and cause now reached for trial; objection sustained and defendant excepts. Defendant then asks court to transfer this cause to the circuit court of the United States for the district of Iowa, on the petition and bond already filed therein. Plaintiff excepts in writing, that applica-
114 tion too late and bond insufficient, and that one surety is an attorney. Objection as to bond and surety sustained and application held too late. Defendant excepts to overruling application as too late, and asks leave to present new bond and further time for this purpose. Application refused, and defendant excepts."

And as to so much of the decree as follows the refusal of the application to file new bond defendant makes no exception. And the defendant further moves the court that judgment and proceedings be stayed in said cause until such correction as herein asked for of said record and decree may be made.

GRANT & SMITH AND
L. M. FISHER,
Attorneys for Dennison & (?).

I, L. M. Fisher, on oath say that I was the attorney for William Dennison and Lewis H. Meyer, in the trial of the above-entitled cause, as to

said Dennison; that I know the alligations in the foregoing motion, and the same are true.

L. M. FISHER.

Subscribed and sworn to before me and in my presence this the 18th day of August, 1875, by the said L. M. Fisher.

[SEAL.] J. B. SATTERLEE, *Clerk*,
By J. M. SULLIVAN, *Deputy*.

STATE OF IOWA,
Scott County, ss:

I, L. M. Fisher, being duly sworn, depose and say that I served the within motion on J. M. Brayton, attorney for the Delaware R. R. Construction Company, personally, by reading the said motion to him, and delivering him a copy thereof in the town of Delhi, and State of Iowa, on the 18th day of August, 1875.

L. M. FISHER.

Subscribed and sworn to before me and in my presence by the said L. M. Fisher this 19th day of August, 1875.

[SEAL.] W. M. KAISER,
Notary Public, Scott County, Iowa.

115 Motion granted in this that no execution issue on the judgment, and decree entered in the cause until after hearing this motion to correct decree. If execution has been issued, clerk will recall the same. Time of hearing the motion, third day of the next term of court.

S. BAGG, *Judge*.

AUGUST 21, 1875.

Filed August 24, 1875.

J. B. SATTERLEE, *Clerk*.

Bill of costs.—G. B. Beveridge, clerk.

1874.			
Jan. 15.	To filing and docketing	$1 50	Rec't filed.
" "	By F. M. Brayton.....(Receipt filed.)		$1 50
" "	To aff't on petition	25	
" "	To aff't	25	
" "	To aff't on reply	25	
" "	To order and continuance	70	
" "	To copies	50	
" "	To trial to court	1 50	
" "	To judgment and decree	1 50	
" "	To taxing, costs, and satisfaction	75	
Feb. 17.	To execution and return	1 00	
April 6.	To aff't on aff't for publication	25	
" "	To aff't on sup't petition	25	
" "	To certificate on sup't petition	25	
May 4.	By A. Dunham, sheriff, for clerk		6 40
" 5.	To aff't on aff't for publication	25	
" "	To trial to court	1 50	
" "	To decree	75	

J. B. SATTERLEE, *Clerk*.

1875.				
Jan.		To 2 orders and bond for costs and costs..	$1 25	
May 2.		To copy for def't	40	
"	"	To 5 affidavits	1 25	
	May 2.	To 8 orders	2 00	
116	"	" To trial to court	1 50	
	"	" To judgment and decree	1 50	
May 2.		To 4 affidavits	1 00	
"	"	To taxing costs	50	
"	"	Satisfaction	25	
"	"	Copy deeds for defendant	50	
"	"	Transcript, 375 fol	34 50	
"	"	Certificate to transcript	50	
"	"	Costs of transmission	75	
		By Grant & Smith		35 75
		For extra work on manuscript	3 70	

SHERIFF'S AND OTHERS' FEES.

1874.				
Jan. 26.		A. Dunham, on sale, paid by pl'ff	$1 30	
"	"	A. Dunham, on pl'ff's sub	2 50	
"	28.	Henry Harger, referee	20 00	
Feb. 6.		J. M. Brayton, copies petition	15 00	Rec't filed.
"	"	J. M. Brayton, copies reply	80	Rec't filed.
May 4.		By sheriff's, for Harger & Dunham		23 80
"	5.	J. B. Swinburne, pub. fee	16 85	
"	18.	Leonard & Geese, on notice	1 20	
"	"	A. Dunham, on notice	2 00	
"	"	A. Dunham, on sale, paid by pl'ff	298 43	
1875.				
May 21.		Beveridge & Dunham, on def't's subpœna.	1 35	
"	"	A. Dunham, on def't's subpœna	50	
"	"	A. Dunham, on def't's subpœna	50	
"	"	A. Dunham, on def't's subpœna	50	
July 3.		A. Dunham, on notice of appeal	80	
1874.				
Jan. 7.		E. Baldwin, witness def't 5–90	15 25	
"	"	Henry Harger, witness def't 3–1	3 85	
"	"	F. B. Doolittle, witness def't 5–1	6 35	Rec't filed.
"	"	G. B. Beveridge, witness def't 1—	1 25	
"	"	A. E. Martin, witness def't 5–1	6 35	Rec't filed.
"	"	R. Eddy, witness def't 5–1	6 35	Rec't filed.
"	"	C. F. Flemming, witness def't 5–1	6 35	Rec't filed.
117	Jan. 7.	R. Boon, witness def't 5–4	6 65	Rec't filed.
	" "	W. L. Richard, witness def't 7–46 ..	13 35	
Feb. 14.		F. B. Doolittle, witness for referee def't 3–1 ..	3 85	Rec't filed.
"	"	A. E. Martin, witness for referee def't 3–1	3 85	Rec't filed.
"	"	R. Eddy, wit. for referee def't 1–1	1 35	Rec't filed.
May 4.		By sheriff on ex. for witness not receipted		33 70
1875.				
May 7.		H. C. Jackson, witness def't 2–1	2 60	
"	"	A. E. Martin, witness def't 2–1	2 60	
"	"	F. B. Doolittle, witness def't 2–1	2 60	
"	"	Henry Harger, witness def't 1–1	1 35	

STATE OF IOWA,
Delaware County, ss:

I, J. B. Satterlee, clerk of the circuit court in and for said county, do hereby certify that the above and foregoing is a full, true, and complete transcript of all the entries of record in the action in which the same are entitled, and of the following pleadings and papers filed in said cause, to wit, the petition, amended petition, original notice, with the sheriff's return therewith, the answer of the Davenport and S't Paul R. R. Co., reply, report of referee (Henry Harger), affidavit for publication (non-residence), supplemental petition, affidavit of publisher of original notice, with copy of notice attached, execution and return, original notice and return, motion for new trial as to William Dennison, trustee, security, for costs of retrial as to William Dennison, trustee, answer of William Dennison, motion to strike answer of William Dennison, amended answer of William Dennison, application of Lewis H. Meyer to be made co-defendant, petition to transfer cause to the U. S. circuit court, bond to transfer cause to U. S. court, motion for continuance, amended answer of William
118 Dennison, affidavit of L. M. Fisher as to Meyer being trustee, objection to transfer of cause, amendment to answer of William Dennison, affidavit of James Grant, findings of court, notice of appeal with release of service, admission of plaintiff's attorneys, J. M. Brayton and Martin, for correction of record and stay of judgment, all as full and complete as the same remain on file and of record in my office, the same being all the matters required to be certified by the parties to said cause. I further certify that the fee-bill hereto attached and made a part of this record, as required by law, is full, true and complete, as the same appears of record in my office. I further certify, that the copies hereto attached, marked respectively Exhibits A, B and C, are, Exhibit A, the "transcribed copy of the minutes of the evidence in said cause, as certified thereon by the report of said court; Exhibit B is a full, true and correct copy of the record of the articles of incorporation of the Davenport and S't Paul Railroad Company, with the amendments thereto introduced in evidence on the trial of said cause, as shown by a careful comparison of said copy with the certified record from the office of the secretary of state of Iowa; Exhibit C is a full, true, complete and compared copy of the mortgage made by the Davenport and S't Paul R. R. Co. to William Dennison et al., trustee, as will further appear by the certificate of the record' of said county, thereto attached, and that said Exhibits A, B and C, with the contract attached by copy to the petition of plaintiff, includes all the evidence introduced on the trial of said cause, to the best of my knowledge; and I further certify, that the affidavit of L. M. Fisher, appearing above, filed in my office on the 21st day of May, 1875, as to the fact of Lewis H. Meyer being the successor of John Edgar Thomson, as trustee, did not, when submitted to his honor Judge Bagg, at the close of the trial of said cause, appear sworn to, but was signed by said Fisher; that on the return of the papers, with the decision of Judge Bragg, M'r Fisher claimed that he
119 swore to said affidavit on the date of its filing before the deputy clerk, who, believing such to be the fact from his own recollection, certified to the affidavit as it now appears of record, and I certify the facts in relation to the same in justice to all the parties in interest, as to the judge who passed upon the said affidavit, not as it now appears, but as not appearing sworn to.

Given under my hand and the seal of said court hereto attached, this 26th day of August, 1875.

J. B. SATTERLEE,
Clerk Circuit Court, Delaware Co., Iowa.

EXHIBIT A.

STATE OF IOWA,
Delaware County, ss:

In circuit court, May term, 1875.

DELAWARE R. R. CONSTRUCTION CO.
vs.
D. & S'T P. R. R. CO. ET AL.

Testimony taken on trial of the above-entitled cause.

Plaintiff offers contract in evidence.
Plaintiff rests.

H. C. JACKSON sworn on the part of defendant.

Direct examination:

Int. 1. Are you the recorder of Delaware County?
Ans. Yes, sir.
Int. 2. You have the records in your possession?
Ans. Yes, sir.
Int. 3. Have you in open court the record of the mortgage of the Davenport & S't Paul Railroad Company to William Dennison and John Edgar Thomson, trustees—the first mortgage?
120 (Plaintiff objects on the ground that the mortgage is the best evidence. Objection overruled and plaintiff excepts.)
Defendant reads record in evidence, book B, page 473, of the records of Delaware County, dated July 1st, 1871.
Int. 4. Was there another mortgage subsequent to this?
Ans. Yes, sir.
Int. 5. Show to the court the record of that.
Ans. That is the supplemental mortgage.
Int. 6. State whether at the time of the discharge of the first mortgage, this second mortgage was not made. Wasn't it made at *at* the same time of the release of the first mortgage; wasn't the second mortgage.
Ans. I don't know. I have not looked up the date.
Int. 7. When was the first mortgage recorded?
Ans. The 25th of March, 1872.
Int. 8. No; that is the second mortgage.
Ans. The first mortgage was recorded the 7th day of February, 1872.
Int. 9. When was it discharged?
Ans. The 24th of August, 1872.
Int. 10. When was the supplemental mortgage executed?
Ans. The 1st day of March, 1872.
Int. 11. When was it recorded?
Ans. The 25th of March, 1872.
Int. 12. When was that discharged?
Ans. The release on the mortgage refers to some other page of the

record, and shows that the release discharges both mortgages August, 1872.

121 Int. 13. Was there any other mortgage executed subsequently to that?

Ans. There was another supplimental mortgage of the same date of the first mortgage.

Int. 14. When was that recorded?

Ans. The 28th of March, 1872.

Int. 15. Was that discharged?

Ans. It was.

Int. 16. When was that discharged?

Ans. The same time that release discharges these three mortgages. There was another mortgage the 1st of July, 1871.

Int. 17. When was that recorded?

Ans. The 4th of June, 1872, page 510, Book "B."

Int. 18. Was that ever released?

Ans. The record does not show a release.

F. B. DOOLITTLE sworn on the part of the defendant.

Direct examination:

Int. 1. Where do you live?

Ans. In Deilhi, Iowa.

Int. 2. What position did you occupy in connection with the Delaware Railway Construction Company in 1870, 1871, and 1872?

Ans. I think I was treasurer at that time.

Int. 3. During what year did you hold that office; at the time of the entering of the Delaware Railway Construction Company into a contract with the Delaware Railway Company to build a road through Delaware County?

Ans. I think I did. If I was not then treasurer I was soon after the contract was made.

122 Int. 4. Did you ever hear in 1871 anything about a mortgage executed by the Davenport & S't Paul Railroad Company?

Ans. I have heard talk about mortgages given by the company at different times and different mortgages, and if it is a fact that the mortgages were then executed I presume I heard of it.

Int. 5. How early do you suppose you heard of it in the year 1871?

Ans. Well, I really can't tell, but probably the time it was exec'ted——

Int. 6. About July?

Ans. I don't know that even, but I know this fact, that whenever the mortgage was executed I at the time or soon after had knowledge of it, because I was mixed up with the railroad, but as to the nature of them or what they were I perhaps didn't have the details.

Int. 7. Were subscriptions made to the stock of the Davenport & S't Paul R. R. Co. through this county?

Ans. Yes, sir.

Int. 8. Do you know how large an amount?

Ans. In the neighborhood of a hundred thousand dollars, I think. My recollection is in the neighborhood of a hundred thousand.

Cross-examination:

X-int. 1. What was it you said you heard about the mortgage?

Ans. I said that when the mortgages were executed I probably had some knowledge of it at the time or soon after, but I have no distinct, definite recollection of any particular mortgage or the details of any of

the mortgages. My information was general information obtained from general talk with the railroad company.

X int. 2. Did you ever see the mortgage?

123 Ans. I don't know that I ever did.

X-int. 3. To come right down to the matter, do you know that there was any mortgage executed of your own personal knowledge any way?

Ans. No; not of my own knowledge, only from general talk with the railroad men generally. I had a general information.

X-int. 4. You have it simply from general rumor?

Ans. Yes. I may have had actual knowledge. If I had I have forgotten. I don't think I had, however.

X-int. 5. It was rumored that there was a mortgage?

Ans. Yes, sir.

X-int. 6. You never saw W'm Dennison, Edgar Thomson or any of the mortgagers?

Ans. I have seen Edgar Thomson.

X-int. 7. Did you ever talk with him about this mortgage?

Ans. No, sir.

X-int. 8. Did he ever give you any notice of this mortgage?

Ans. No, sir.

Redirect examination:

Int. 9. Was not this mortgage known by each of the other officers?

Ans. I don't know. I think it was a general rumor.

Int. 10. It was generally talked along the road?

Ans. I think it was.

Int. 11. And so with all these mortgages subsequent?

Ans. They were generally talked about.

Recross-examination:

124 X-int. 9. When did the plaintiff in this case, the Delaware Railroad Construction Company, when did they commence work?

Ans. They commenced work I think in December, 1870.

X-int. 10. Was it under that contract? (Showing witess a contract.)

Ans. Yes, sir; it was under this contract.

X-int. 11. Did they complete the work of grading and furnishing the road through this county with that company under that contract?

Ans. Yes, sir.

X-int. 12. Was it accepted by the railroad company?

Ans. It was.

X-int. 13. Do you remember when it was completed?

Ans. My recollection now is that it was in September, or the early part of October, 1872. That is my present recollection. I could tell by dates to refresh my memory, but that is my recollection.

A. E. MARTIN sworn on the part of the defendant.

Direct examination:

Int. 1. What is your name?

Ans. A. E. Martin.

Int. 2. Where do you live?

Ans. In Delhi, Delaware County.

Int. 3. What position did you occupy in connection with the Delaware Construction Company in the year 1870, 1871, and 1872, at any time during that time?

Ans. I think in 1870 I occupied no position in that company. In 1871, I was secretary.

Int. 4. What time in 1871 did you come into that office?

Ans. If my recollection serves me right, our election was the last Saturday in the month of December, 1870, which I think was on the 26th day.

125 Int. 5. Did you hear anything about the mortgage executed by the D. & S't P. R. R. Co. in 1871?

Ans. Yes, sir; I think I did.

Int. 6. Tell us what you heard about it?

Ans. I think somebody told me that there had been such a thing issued. A mortgage placed upon the road.

Int. 7. Do you know how early in 1871?

Ans. No, sir. I couldn't tell you, and it might not have been until 1872 that I heard of it. I couldn't say positively as to that.

Int. 8. But you think it was in 1871?

Ans. Well, I can't say. It was in 1871 or 1872.

Int. 9. Were there any subscriptions made to the Delaware & S't Paul R. R. Co.?

Ans. Yes, sir.

Int. 11. What amount?

Ans. My impression is that it fell something short of a hundred thousand dollars, or it might have went over a hundred thousand dollars. My impression is about a hundred thousand dollars. I don't know whether it was over or below that.

Int. 12. Did you hear of other mortgages after the execution of this mortgage in 1871?

Ans. Well, my impression is now that I never have heard of but two mortgages.

Int. 13. When was the last one you heard of?

Ans. I can't tell that. I don't think I know anything about the last one, until 1873. It might have been earlier than that, but I don't know.

Cross-examination:

X-int. 1. Do you know who you heard anything about that mortgage from?

126 Ans. No, sir.

X-int. 2. Was it anything besides general rumor?

Ans. No, sir.

Redirect examination:

Int. 14. These mortgages were generally talked about, weren't they?

Ans. Yes, sir.

DOOLITTLE recalled on the part of plaintiff.

Direct examination:

Int. 12. Do you remember when the iron was laid on the road in this county?

Ans. It was principally in the fall of 1872, summer and fall. It was principally in the year 1872, perhaps all—I wouldn't say positively.

Int. 13. Do you remember the time when they commenced laying the track from below Hopkinton up; through the winter it was some distance below the village of Hopkinton. About how far in this county had it been laid at the commencement of 1872?

Ans. I think in February or March it was laid two or three miles.

Int. 14. How long after that before they commenced again laying iron?

Ans. I think they didn't commence until about harvest time, or perhaps after harvest, when they left off.

Int. 15. About what month?

Ans. I should say in the month of August.

Cross-examination:

X-int. 14. When did you say that the iron was laid through Delaware County?

Ans. I think in February and March, 1872, it was laid from
127 the southern line of the county up about three miles this way, and then there was no more laid, my recollection is, until August, 1872. It may have been the last of July, but I should think August.

X-int. 15. How far was it laid up to June?

Ans. About that three miles I spoke of. It was laid in February or March, 1872.

X-int. 16. How much was laid in April or May?

Ans. None.

X-int. 17. When again did you begin to lay iron?

Ans. I think it was in August they commenced afterwards. I know they continued and they reached here, my recollection is they reached here some time in September and then continued right on through.

X-int. 18. In August, they were how far?

Ans. When they commenced in August, they were about three miles in this county.

X-int. 19. And they had that laid in March, 1872?

Ans. Yes, sir.

X-int. 20. When did they reach the northern line?

Ans. I think it was some time in the fall. I don't remember just how late. I think they passed here the last of September, or some time in September were passed here. They finished late in the fall of 1872.

X-int. 21. How late in the fall?

Ans. I wouldn't pretend to give the date, but my recollection is, judging from the season, the weather and the circumstances of finishing up and furnishing the ties, my recollection is, it got to be fall weather, say in the last of October. It may have been the first of October when they passed out of this place. No, it couldn't have been that.

X-int. 22. How far had they laid the iron upon the first of September?

128 Ans. Well, I can't tell you. It is possible they didn't commence down below Hopkinton until near the first of September.

X-int. 23. Your impression is they began before?

Ans. Yes, sir, the last of August or the first of August; or they may have commenced along the last of July, and worked along and got up here towards the last of September, and then continued right along; but I think the iron was all laid in this county in 1872. That is my recollection.

HENRY HARGER sworn for defendant.

Direct examination:

Int. 1. What office did you hold in this county from the year 1870? Did you hold the office of recorder in this county?

Ans. Yes, sir.

Int. 2. State when.

Ans. From 1867 to 1875. The first of Jan'y, 1875.
Int. 3. What book is that you have in your hand?
Ans. This is the record of the articles of incorporation.
Int. 4. It contains the articles of incorporation filed in this county?
Ans. Yes, sir, up to 1868, August, 1868.
Int. 5. Does that contain a copy of the articles of incorporation of the Davenport and S't Paul R. R. Co.?
Ans. It does.
(Plaintiff offers articles of incorporation in evidence.)
Int. 6. After these articles of incorporation, were there any other articles of incorporation or any change filed in your office whilst you was recorder?
Ans. I think not. My attention was called to it, I think, the last day I was in the office, and I found none.

129 Cross-examination:

X-int. 1. You state that is the record of articles of incorporation of the D. & S't P. R. R. Co.?
Ans. Yes, sir.
X-int. 2. Also of the articles of incorporation of the Delaware Construction Co.?
Ans. I think they are in the same book.
X-int. 3. When were the articles of the Delaware Railway Co. filed?
Ans. I couldn't tell without looking at them. I think some time in 1868.
X-int. 4. When were the articles of this Delaware Construction Company filed?
Ans. Some time after that. I couldn't tell without referring to the book.

DOOLITTLE recalled.

Int. 16. You are now a director in the Davenport and S't Paul R. R. Co.?
Ans. Yes, sir.
Int. 17. Do you know how much stock was subscribed to that company?
Ans. I can't tell.
Int. 18. Do you not know it to be less than a million dollars?
Ans. I do.

The trial of the case was here continued until Saturday morning, when the following further testimony was taken:

F. B. DOOLITTLE recalled by defendant.

Direct examination:

Int. 19. Are you a member, one of the original corporators of the Davenport and S't Paul R. R. Company?
130 Ans. Yes, sir.
Int. 20. You are the person named in these articles of incorporation?
Ans. Well, I was one of the first incorporators.
Int. 21. You are that Doolittle?
Ans. Yes, sir.
Int. 22. Were you a director in that company?
Ans. I was.

Int. 23. At the time this contract was made with the Delaware R. R Construction Company?

Ans. I think I was at that time. There was one year that I was not, but I think I was at that time.

Int. 24. Do you remember what year you was not?

Ans. No, I don't; but my recollection is that it was in 1872 that I was not.

Int. 25. Were you a director in 1870?

Ans. I think I was.

Int. 26. Were you in 1871?

Ans. I think not.

Int. 27. What office did you hold in connection with the company in 1871, with the railroad company?

Ans. I was assistant treasurer and right-of-way agent for this county.

Int. 28. What office did you hold in the Delaware Construction Company at that time, in 1871?

Ans. I was treasurer of that company.

Int. 29. May I ask you if you collected the subscriptions for the stock of the Davenport & S't Paul R. R. Co. in this county or any part of it?

Ans. I did, sir.

Int. 30. What did you do with the proceeds of the subscriptions that you collected?

131 Ans. I did various things with them. Paid for right of ways, paid the engineers and incidental expenses, and paid the Delaware Railway Construction Co.

Int. 31. You paid them?

Ans. Yes, sir.

Int. 32. Did you continue to pay to them until the change that was made in the contract in 1872?

Ans. Yes, sir; and after, I think.

Cross-examination:

X-int. 24. You say you collected certain subscriptions. Subscriptions for what?

Ans. Subscriptions for the stock of the Davenport & S't Paul R. R. Co.

X-int. 25. In what capacity did you collect these subscriptions, as what officer?

Ans. As assistant treasurer of the Davenport and S't Paul R. R. Co.

X-int. 26. Under whose direction did you collect them?

Ans. Under the direction of M'r Price and the executive committee. M'r Price was president of the road.

X-int. 27. Under whose direction did you disburse them?

Ans. Under his and the executive committee. M'r Price was the president of the road.

X-int. 28. The counsel mention a certain change of contract. State if at the time there was any change in the plan of the estimates of the road through this county from the time the contract was made up to the time that change was made, if there was any change made, and, if so, what.

Ans. I don't know that I understand you. Change in regard to work?

X-int. 29. I mean any change made in relation to the work by the railroad company?

132 Ans. There was a change made after we took the contract, and after the work had commenced.

X-int. 30. What was that change?

Ans. Well, it was a change in the plan of building. The originals for building eight-foot banks and the cuts I don't recollect. They were very narrow, and it was changed from that, and the banks were made twelve feet and the cuts sixteen—perhaps eighty (?). It increased the amount of work very materially.

Int. 31. About what per cent. should you say this increase was in the plan?

Ans. I couldn't give an intelligent opinion, hardly.

Int. 32. Was it at 1-10, 1-4, 1-5, 2-3, double, or thribble? State as near as you can.

Ans. I would say it would add to the work $\frac{1}{3}$, but it is without making any figures or investigating it.

Redirect:

Int. 33. Is this the contract you speak of, sir? (Showing witness contract.)

Ans. I think so.

Int. 34. Can you point anywhere on that contract where it is specified that the bank is to be eight feet?

Ans. No, sir; it was never put into the contract; I think not.

Int. 35. The work was to be done according to this contract?

Ans. Yes, sir; the engineers to give directions about that; but Price fixed upon the dimensions of the bank, and to change the cuts determined that the bank should be made eight feet, as the Maquoketa branch was built, but it was afterwards concluded that they were too narrow; it would wash down, and make the banks so narrow that it was not safe, and they were made wider.

133 Int. 36. When you speak of this change, you don't mean that there was any new contract made about it?

Ans. Oh, no.

Int. 37. That was done under this contract by the engineer, was it not?

Ans. Yes, sir.

Int. 38. You say you paid this money by the order of Price?

Ans. Yes, sir; and the executive committee of the D. & S't P. R. R. Co.

Defendant offers in evidence the articles of incorporation.

It is admitted by the parties to this suit that the first amendment to the articles of incorporation changing their place of business was recorded in the Scott County records and not in the recorder's office in Delaware County.

The foregoing is a transcript of the testimony taken in the above-entitled case as made by me.

Dated July 17th, 1875.

E. V. HAYDEN,
Reporter Circuit Court, 9th Jud'l Dist., Iowa.

EXHIBIT B.

Articles of incorporation of the Davenport and S't Paul Railroad Company, together with amendments.

ARTICLE I. The name of this corporation shall be the Davenport & S't Paul Railroad Company.

ARTICLE II. The elective officers of the corporation shall consist of a

president, vice-president, and treasurer, and a board of directors, consisting of eleven members; and the president and vice-president shall be ex-officio members of said board, all of whom shall be elected
134 on the 27th day of May, 1868, and shall hold their offices until the first annual election, and until their successors are elected and qualified. Seven members of the board shall constitute a quorum.

ARTICLE III. The regular annual meetings of the stockholders for the election of officers shall be held at the office of the company, on Wednesday after the first Monday in January in each year.

ARTICLE IV. All of the elective officers, after the first election, shall be actual stockholders of the corporation.

ARTICLE. V. The office and principal place of business of the company shall be at Delhi, Delaware County, Iowa. The board of directors may at any time change the place of business by a two-thirds vote, and designate the location thereof.

ARTICLE VI. The general nature of the business of this corporation shall be the constructing and operating of a railroad, commencing at Davenport, Iowa, thence via Canton, Cascade, Sand Spring, Hopkinton, Delhi, Delaware, Strawberry Point, Brush Creek, and Fayette, to S't Paul, Minnesota.

ARTICLE VII. The capital stock of the corporation shall be three millions of dollars, with the privilege of increasing it to five millions; to be divided into shares of one hundred dollars each, to be subscribed for and paid in as hereinafter provided.

ARTICLE VIII. One per cent. of the subscription for stock shall be paid at the time of subscribing. The balance in installments, at the call of the directors, which shall not exceed four per cent. in thirty days after subscribing for the same, and five per cent. per month thereafter. The board of directors are authorized to take and accept of additional stock and subscriptions in money, real estate, or other property, for the benefit of the company.

135 ARTICLE IX. Any person owning one or more shares of stock, as provided by article seven hereof, upon which there remains no unpaid assessment or installment then due, shall be entitled at all meetings of the stockholders to one vote for each share of such stock.

ARTICLE X. Certificates of stock shall be issued to all subscribers, with an endorsement of the amount paid thereon. Such certificate shall only be assignable on the books of the company, under such regulations as the board may adopt. If any installment of stock should not be paid within sixty days after it is due, the board may, at their discretion, declare such stock and the payments made thereon forfeited.

ARTICLE XI. The indebtedness or liability of the corporation shall in no case exceed two-thirds of the capital stock.

ARTICLE XII. The private property of the stockholders shall not be held liable for the debts of the corporation beyond the amount of the unpaid installments on the stock owned by them.

ARTICLE XIII. The time of the commencement of this corporation shall be on the 27th day of May, 1868, and continue for fifty years, with the privilege and right of renewal.

ARTICLE XIV. These articles may be altered or amended at any annual meeting of the corporation, but no alteration or amendment shall be made without previous notice thereof having been given by publication in some newspaper, as convenient as practicable to the principal place of business of the company, for four consecutive weeks previous thereto, which last publication shall be at least thirty days prior to the

day of said meeting. The articles of incorporation may also be amended by the unanimous vote of all the directors.

136 ARTICLE XV. The board of directors shall employ a suitable person to act as secretary of said company to keep a correct and full account of all its affairs, which shall at all times be subject to the inspection of any stockholder. Said board are authorized to employ such other clerks, managers, and agents as they may deem essential to the good of the company, and the board may fill by appointment all vacancies in their body. The affairs of the company shall be conducted by the board of directors, and they are as a board hereby invested with all the powers and authority necessary to carry out the objects of this corporation, as limited by these articles. The board of directors may also adopt such by-laws as they may deem to be for the best interests of the corporation, not inconsistent with these articles.

ARTICLE XVI. The treasurer shall give bonds in a sum to be fixed by the board of directors, with security to be approved by them, conditioned for the faithful performance of his duties. The board of directors may at any time require additional bonds to be given by said treasurer.

ARTICLE XVII. All bonds for loans and certificates of stock shall be signed by the president and countersigned by the secretary.

ARTICLE XVIII. At all meetings of the stockholders a majority of all the stock subscribed, upon which there are no unpaid assessments, must be represented, directly or by proxy, before business affecting the company can be transacted.

ARTICLE XIX. Special meetings of the stockholders may be convened by the president by order of the board of directors, or whenever stockholders owning a majority of the stock of said company shall apply therefor, by petition in writing directed to the president through the secretary. The business of special meetings shall be confined to the objects specified in the notice calling the same.

137 *Amendments to the articles of incorporation.*

ARTICLE I. Resolved, by the board of directors of the Davenport & S't Paul Railroad Company, that the office and principle place of business of said company be changed from Delhi, Iowa, to Davenport, Iowa.

ARTICLE II. At a meeting of the board of directors of the Davenport & S't Paul Railroad Company, held at the office of the company, in Davenport, Iowa, on the 17th day of March, A. D. 1869, it was resolved by said board of directors, by a unanimous vote: "That article six of articles of incorporation of the Davenport & S't Paul Railroad Company be amended by striking out from said article six the words 'Canton,' 'Sand Spring' and 'Brush Creek.'"

ARTICLE III. At a meeting of the board of directors of the Davenport & S't Paul Railroad Company, held at the office of the company in Davenport, Iowa, on the 17th day of March, A. D. 1869, it was resolved by said board of directors, by a unanimous vote, that the following be adopted as a substitute for article two of the articles of incorporation of the Davenport & S't Paul Railroad Company, viz:

"The elective officers of the corporation shall consist of a president, vice-president, and treasurer and board of directors, consisting of thirteen members. The president and vice-president shall be ex-officio members of the board. Said directors shall be elected by the stockholders at their annual election, and shall hold their offices for one year, and until their successors are elected and qualified. The board of directors shall upon their election immediately proceed to elect a presi-

dent, vice-president, and treasurer, who shall also hold their offices for the term of one year, and until their successors are elected and qualified. Nine members of the board shall constitute a quorum."

138 ARTICLE IV. At a meeting of the board of directors of the Davenport & S't Paul Railroad Co., held at the office of the company, in Davenport, Iowa, on the 17th day of March, A. D. 1869, it was resolved by the said board of directors, by a unanimous vote, that article eight of the articles of incorporation of the Davenport & S't Paul Railroad Company be amended by adding thereto the following, viz: The board of directors are hereby authorized to take and accept of stock upon other terms than those provided for in said article, and with such conditions as they may deem for the benefit of the company.

ARTICLE V. At a meeting of the board of directors of the Davenport & S't Paul Railroad Company, held at the office of said company, in the city of Davenport, on the 10th day of September, 1869, the following amendments to the articles of incorporation of said company were unanimously adopted, to wit:

"Resolved, That the articles of incorporation be so amended as to allow the president elected at this meeting to hold his office until the annual election of the stockholders in January, 1872, and to discharge the duties of treasurer until the further order of the board of directors.

"Resolved, That the articles of incorporation be so amended as to allow the directors now elected to hold their offices until the annual meeting of the stockholders in January, A. D. 1872."

ARTICLE VI. At the annual meeting of the stockholders of the Davenport & S't Paul Railroad Co., held at the office of the company, in Davenport, Iowa, on the 4th day of January, 1871, article VII of the articles of incorporation was amended by increasing the capital stock to nine millions of dollars.

Article X of said articles of incorporation was amended by striking out the word "shall," in the first line, and substituting therefor the word "may."

139 ARTICLE VII. At a meeting of the board of directors held at the office of the company, at Davenport, on the 4th day of January, 1871, it was, by unanimous vote,

Resolved, That article VI of the articles of incorporation be amended by striking out the words "Cascade," "Canton," and "Sand Springs."

Resolved, That the articles of association be amended so that the annual election of officers shall be held on the third Wednesday after the first Monday in January.

EXHIBIT C.

Trust deed.

THE DAVENPORT AND S'T PAUL RAILROAD Company
vs.
JOHN EDGAR THOMPSON AND WILLIAM DENnison.

This indenture, made on the first day of July, in the year of our Lord one thousand eight hundred and seventy-one, between the Davenport and S't Paul Railroad Company, a corporation organized and formed by and under the laws of the State of Iowa, party of the first part, and

John Edgar Thomson, of the city of Philadelphia, in the State of Pennsylvania, and William Dennison, of the city of Columbus, in the State of Ohio, party of the second part, witnesseth, that, whereas, the said party of the first part is authorized by law to borrow all such sum or sums of money as shall be necessary for the construction, equipment, and maintenance of its road, and to convey all its corporate property, franchises and effects, by mortgages and deeds of trust, to secure the payment of all such indebtedness as shall be so contracted by it.

And whereas the said party of the first part has, by a resolution of the board of directors, duly authorized and empowered its president and secretary to execute, and in its corporate name to issue bonds
140 to be designated first-mortgage bonds, to be secured by a mortgage or deed of trust, in such form and with such covenants and conditions as the said president should deem most desirable for the best interests of the said corporation, for the purpose of securing the necessary means to iron and equip its said railroad and a sinking fund of $40,000 per annum, to begin July 1st, 1875; the said bonds to be issued at a rate not to exceed the sum of $20,000 for each mile of said railroad upon which the work of grading, bridging, and tieing shall have been completed, and to be issued from time to time as the said work shall progress.

And whereas the said resolution authorized the said president to designate the trustees; and John Edgar Thomson, of Pennsylvania, and William Dennison, of Ohio, having been designated by him as such trustees, to whom the said property of the said corporation should be conveyed to secure the payment of the principal and interest of the said bonds, so to be issued; to incorporate in such mortgage or deed of trust as should be executed for the purpose aforesaid such covenants and conditions as should be deemed by him necessary and proper to promote and sustain public confidence in the security of the said bonds and fix the rate of interest which the said bonds should bear.

And whereas the said president has determined to issue the said bonds in the sums of $1,000 each, payable at the agency of the said railroad company, in the city of New York, on the first day of July, in the year of our Lord one thousand nine hundred and eleven, bearing interest at the rate of seven per centum per annum, payable semi-annually in New York, London, or Frankfort, at suitable agencies, to be selected in said cities by said railroad company, and also make both the principal and interest of the said bonds payable in gold coin in the United States of America, of or equal to the present standard; and to have the
141 said bonds duly prepared and deposited with the said parties of the second part, to be delivered over by them to the treasurer of the said company, on the order of the president, in an amount, from time to time, not to exceed the sum of $20,000 for each mile of said road upon which the work of grading, bridging, and tieing shall have been completed, which said bonds are in the form following, that is to say:

Form of bond.

$1,000.] Whole issue $6,000,000. [No. —.

UNITED STATES OF AMERICA, STATE OF IOWA.

Seven per cent. first mortgage sinking fund bond. The Davenport and S't Paul Railroad Company.

The Davenport and S't Paul Railroad Company, a corporation exist-

ing under and by authority of the laws of the State of Iowa, promises to pay to John Edgar Thomson, or bearer, on the first day of July, one thousand nine hundred and eleven, in the city of New York, one thousand dollars in United States gold coin, of or equal to the present standard, with interest thereon at 7 per cent. per annum, free of United States taxes, semi-annually, on the first days of January and July, in like gold coin, upon presentation and surrender of the annexed coupons therefor, such interest to be paid either in New York, London, or Frankfort, at suitable agencies to be hereafter named in each of those cities, at the option of the holders, as specified in the coupons. In case of default in payment of such interest when due, and continuance of such default for sixty days after demand, the principal of this bond will be subject to become due and payable, upon the condition provided in the trust deed hereinafter mentioned.

This bond is one of six thousand bonds for one thousand dollars each, of like tenor and date, numbered from one to six thousand inclu-
142 sive, to be issued on the said railroad, at the rate of twenty thousand dollars per mile, as from time to time the road shall progress, from the city of Davenport, in the State of Iowa, to the city of St. Paul, in the State of Minnesota; it being expressly understood that said issue of bonds shall not exceed the amount named per mile, and shall only be issued as the road shall progress.

The owner of this bond shall have the right at any time to convert it into the stock of the company at par. The payment of this bond is secured by a mortgage or deed of trust of the company on its road-bed, depot grounds and buildings, rolling stock, machinery, franchises, and all its property of every kind, as also net incomes acquired and to be acquired, to John Edgar Thomson, of Pennsylvania, and William Dennison, of Ohio, trustees, dated July 18th, 1871, and duly recorded in all the counties through which the road is being constructed. This bond is, moreover, secured by a sinking-fund of $40,000 per annum, to begin July 1st, 1875, to be set apart and increased annually, for the redemption of the said bonds.

This bond is transferable by delivery, but it may be registered as to its ownership on a registry to be kept by the company.

After a registry of ownership, certified hereon by the transfer agent of the company, no transfer shall be valid unless made on the books of the company, except if the last transfer be to bearer, transferability by delivery shall be restored; subject to successive registration and transfer to bearer as aforesaid, at the option of any lawful holder. This bond is further authenticated by the endorsement of said trustees hereon.

In witness whereof, the said company has caused the foregoing to be attested, on its behalf, by the signature of its president and sec-
143 retary, and its corporate seal to be affixed hereto, at Davenport, Iowa, this first day of July, A. D. 1871.

President.

Secretary.

Form of coupon.

£7 5*s.* 10*d.*] $35.00. [Fl. 87. 30.

The Davenport and S't Paul Railroad Company will pay to the bearer, as he may elect, in the city of New York, thirty-five dollars, United States gold coin; or in London, seven pounds five shillings and ten

pence sterling; or in Frankfort, O. M., eighty-seven florins and thirty krutzers; free of United States taxes, on the first day of January, 18—, being six months' interest on bond No. .

Secretary.

Form of trustees'c ertificate.

The undersigned hereby certify that this bond is one of the series of bonds described in and secured by the within-mentioned deed of trust or mortgage, bearing date the first day of July, A. D. 1871.

Trustees.

And to each of said bonds there is to be affixed the requisite United States internal revenue stamp. And, whereas, the said board of directors of the Davenport and S't Paul Railroad Company have formally passed and adopted a resolution authorizing the president and secretary of the said company to execute in its corporate name, and to affix thereto its corporate seal, a deed of trust to the said John Edgar Thom-
144 son and William Dennison, to secure the payment of the principal and interest of the said bonds, as the same shall become due, according to the tenure and effect thereof: Now, therefore, this indenture witnesseth, that the said the Davenport and S't Paul Railroad Company, for and in consideration of the premises and of the sum of one dollar to this day paid by the said parties of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of the principal and interest of the said bonds, as the same shall become due and payable, according to the tenor and effect thereof, and of the said coupons thereto severally annexed, hath granted, bargained and sold, and by these presents doth grant, bargain and sell, convey, release, and confirm unto the said parties of the second part, and to their successor or successors, as trustees, all and singular, the road-bed and superstructure of the said, the Davenport and S't Paul Railroad, including all branches, side tracks, additions, turn-outs, rights of way, depot-grounds, coal-lands, timber-lands, and other lands, now owned and that may hereafter be acquired by said party of the first dart; all depots, station-houses, engine-houses, car-houses, water-tanks, freight-houses, grain-houses, grain-elevators, wood-houses, coal-houses, car-shops and machine-shops, and all other buildings whatsoever, now erected or hereafter to be erected. Also, all kinds of machinery and tools, now held and owned, or hereafter to be acquired, by said party of the first part, for use in connection with the said railroad, including all locomotives, tenders, cars, or other rolling-stock or equipments, and all tools, implements, fuel, and materials of every kind, used or procured for use, in the constructing, operating, repairing, or replacing any part or parcel of the said railroad, or any part of its appurtenances; also, all property and franchises connected with or relating to the said railroad, or any part of its business, in any wise whatsoever, which are now held, or may be hereafter in any way acquired, by the said party of the first part; and also, all rights, claims, and benefits in or to any
145 lease, contract, or agreement now made, or which may hereafter be made by the said first party, with any person or persons whomsoever.

Together with all and singular the tenements and appurtenance thereto belonging or in any wise appertaining, and the reversions, remainders, tolls, incomes, rents, issues, and profits thereof, and also all the estate, right, title and interest whatsoever, as well at law as in equity, of the said party of the first part, of, in, to, or out of the same, and every part or parcel thereof:

To have and to hold the premises above particularly described and set forth unto the said parties of the second part, and to their successor or successors, as trustee or trustees. In trust nevertheless, for the uses and purposes hereinafter set forth and expressed, and upon the terms, covenants, agreements, and conditions following, that is to say:

First. The actual possession, occupation and management, and the use and control of the said railroad, and of all the appurtenances thereof, shall be, remain and lie, with the said party of the first part, without molestation or interference by or from the parties of the second part, or their successor or successors in the said trust, until default be made in the payment of the principal of the said bonds, or some of them, or until default be made in respect to something herein required to be done by the said party of the first part, and until such default be made as aforesaid, the said party of the first part shall take and use all the earnings, incomes, profits, rents, tolls, and issues of the premises, and dispose of the same in any manner not inconsistent with the terms of the instrument.

Second. The bonds which shall be executed and issued by the said party of the first part, under the provisions of this instrument, and therein recited, shall be delivered to the said parties of the second part, to be countersigned by them as trustees hereunto, and no bond shall be valid or binding, or be benefited by the provisions hereof, unless
146 the same shall be countersigned by the said parties of the second part, or their successors in the said trust, by signing their names in their own proper handwriting, respectively, to the certificate to each of the bonds appended and made a part thereof, and the said parties of the second part shall not, at any time countersign or permit to be issued any bonds in excess of the rate of twenty thousand dollars for each mile of the said road, upon which the work of grading, bridging, and tieing, shall have been finished and completed.

Third. In case default shall be made in the payment of any of the interest coupons annexed to any of the foregoing bonds, according to the tenor thereof, and if such default shall continue for the period of six months, it shall be lawful for the party of the second part, by their duly authorized officer, agent or attorney, upon the request of the person or persons owning and holding one-fourth in amount of such delinquent interest coupons, made known to the said parties of the second part in writing, signed by the person or persons therein interested, or by his or their lawfully constituted agents or attorney, to enter into and upon all and singular the premises hereby conveyed, and each and every part thereof, and to have, hold, and use the same, under such superintendent, manager, receiver, or agent as the parties of the second part may select to conduct the business of the said railroad and its branches, and to exercise the franchises pertaining thereto, and to make from time to time all repairs, replacements, additions, and improvements thereto, as may seem judicious, and to collect all earnings, dues, freights, incomes, rents, tolls, issues, and profits of the same, and of every part thereof, and after deducting the necessary expenses of operating the said railroad and of conducting the business thereof, and of all the said repairs, replacements, additions, and improvements, and of all taxes, assessments, or liens upon the said premises, or any part

thereof, as well as a just compensation for their or his own services, to apply the moneys arising as aforesaid to the payment of interest
147 coupons, in the order in which they shall have respectively become due; and after paying all such past-due coupons, and all installments or balances thereof, to apply the remainder of said moneys to the satisfaction of the principal of the aforesaid bonds which may at that time be due and unpaid, rateably, and without discrimination or preference.

Fourth. In case default shall be made as aforesaid, and shall continue as aforesaid, it shall also be lawful for the said parties of the second part, after entry as aforesaid, or without entry, on the request of the person or persons owning and holding the majority in amount of the said delinquency, expressed in writing to the said parties of the second part, to sell and dispose of the premises hereby conveyed at public auction, in the city of New York, or at such place as the parties of the second part may designate, having first given notice of the time and place of such sale by advertisement, published not less than once a week, for six months, in one or more newspapers published in each of the cities of New York and Davenport, and to adjourn the said sale from time to time, by announcement at the time and place advertised, without other notice, and to make and deliver unto the purchaser or purchasers thereof, good and sufficint deeds, conveyance, or other assurance in the law, to vest in the said purchaser or purchasers of the said premises an absolute estate in said premises in fee simple; which sale, so made, as aforesaid, shall be a perpetual lien, both in law and in equity, against the said party of the first part, and all and every other person or persons claiming or to claim the same by, from, through, or under the said party of the first part; and after deducting from the proceeds of such sale, just allowance for all the expenses thereof, including a reasonable amount for attorney's fees, and any other necessary expense incurred by the said trustees in managing the business of the said railroad, while in possession, or in arranging the sale thereof, to apply the remaining pro-
148 ceeds to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid, whether or not the same shall have previously become due, and the interest which shall, at that time, have accrued on the said principal, and be unpaid, without discrimination or preference, but rateably to the aggregate amount of such unpaid principal and such accrued and unpaid interest in United States gold coin at par; and if, after satisfaction thereof as aforesaid, a surplus of the said proceeds shall remain, to pay the same over to the party of the first part.

Fifth. At any sale of the aforesaid property, or any part thereof, whether made under the power herein granted or by judicial authority, the parties of the second part may bid for and purchase the property so sold, or any part thereof, for and on behalf of the holders of the bonds hereby secured, and then outstanding, in proportion to the respective interests of such bondholders.

Sixth. In cause default shall be made in the payment of any half-year's interest on any of the aforesaid bonds, according to the tenor and effect of the coupons thereto annexed, and if such default shall continue for the period of six months after such coupons shall have become due, and payment thereof shall have been demanded, then the principal of all the bonds secured hereby, if a majority in interest of all the holders of the said bonds shall so direct, in writing, before the interest so in arrears shall have been paid, shall be declared by the said parties of the second part to be immediately due and payable, and thereupon the same shall

become due and payable, anything contained in the said bond or herein to the contrary notwithstanding.

Seventh. The said party of the first part shall from time to time, and as often as thereunto requested by the said trustees, or their successor or successors in the said trust, execute, acknowledge, and deliver all such further deeds, conveyances, and assurances as shall be neces-
149 sary for the better assuring unto the trustees aforesaid, or their successors, the said railroad and equipments, rights, and equities hereinbefore mentioned, or intended so to be, and all other property and things whatsoever, which may be hereafter acquired for use in connection with the same or any part thereof, and all franchises now held, or hereafter to be acquired, including the franchise to be a corporation.

Eighth. The said trustees and their successors shall have full power in their discretion, upon the written request of the party of the first part, to convey, by way of release or otherwise, to the person or persons designated by the said party of the first part, any lands acquired or held for the purpose of stations, depots, shops, or other buildings; and shall also have power to convey as aforesaid, on like request, any land or property which, in the judgment of the said trustees for the time being, shall not be necessary for use in connection with the said railroad, or which may have been held for a supply of fuel, gravel, or other material, and also to convey as aforesaid, on like request, any land not occupied by the track, which may become disu'ed by reason of a change of the location of any station-house, depot, shop, or building connected with the said railroad, and such lands occupied by the track and adjacent to such station-house, depot, shop, or other building as the said party of the first part may deem it expedient to disuse or abandon, by reason of such change, and to consent to any such change, and to such other changes in the location of the track, or depots, or other buildings as in their judgment shall have become expedient; and to make and deliver the conveyances necessary to carry the same into effect; but any land which may be acquired for permanent use in substitution for any so released, shall be conveyed to the said trustees upon the trusts of these presents; and the said trustees for the time being shall also have full power to allow the said party of the first part from time to time
150 to dispose of, according to the discretion, such portions of the equipments, machinery, and implements at any time held or acquired for the use of the said railroad as may have become unfit for use, replacing the same by new, which shall be conveyed to the said trustees, or otherwise made subject to the operation of these presents.

Ninth. It is hereby declared and agreed that it shall be the duty of the trustees aforesaid, and their successors, to exercise the power of entry hereby granted, or the power of sale hereby granted, or both, or to take the appropriate proceedings in equity, or at law, to enforce the rights of the holders of the said bonds, under these presents, upon the written request hereinbefore mentioned, when the person or persons making the same shall furnish to the said trustees a proper indemnification against the cost and expenses to be incurred by them therein.

Tenth. It is mutually understood and agreed by and between the parties hereto that the word trustees, as used and employed in these presents, shall be construed to mean the trustees for the time being; and whenever any vacancy occurs by the death, resignation, disability, or refusal to act of either of the said persons named herein as such trustees, or any of their successors in the said trust at any time, the board of directors, by a majority thereof, of the said The Davenport & S't Paul Railroad Company, shall have the right to appoint a successor to

fill such vacancy, such appointment to be attested in writing by the signatures of the president and secretary, and by the corporate seal of the said corporation, and the written acceptance of such appointment shall immediately, and by force of such vote of the said board of directors and the said acceptance, vest all authority, right, and power in such new trustee or trustees, as fully and completely, in all respects, as if he or they had been herein named as party or parties to the second part. But if at any time such vacancy should continue for a period of thirty days by reason of the neglect or refusal of the said board of directors
151 to act in the premises, or for any good cause therefor shown, any court of competent jurisdiction within the State of Iowa, in any of the counties through which the said road may run, shall have power to appoint such trustees, anything in the said bonds or in these presents to the contrary thereof notwithstanding. In all cases in which the trustees may be required to act, they are hereby invested with full powers of arbitrament and of compromise, and of appointing agents and attorneys to act in their behalf.

Eleventh. The said party of the first part, in consideration of the premises, and of the said sum of one dollar duly paid as aforesaid, hereby further covenants and agrees to and with the said parties of the second part and their successor or successors in the said trust, to have an office or agency in the city of New York for the payment of the principal, and an agency in each of the cities of New York, London, and Frankfort for the payment of the interest of the bonds hereby secured, as the same shall respectively become due and payable.

Twelfth. The said party of the first part, for the considerations aforesaid, hereby further covenants and agrees to and with the said parties of the second part and their successor or successors, that the proceeds of the said bonds shall, at all times, be faithfully applied to the uses and purposes hereinbefore specified, and to no other use or purpose whatever.

Thirteenth. The said party of the first part agrees and covenants with the party of the second part and their successors, that it will create a sinking fund for the redemption of the whole amount of the bonds hereby secured, and will therefore set apart and deposit with a sinking-fund commissioner or commissioners, to be appointed by the party of the first part on the first day of July, 1875, the sum of $40,000, and will on the first day of July of each and every year thereafter
152 deposit with said commissioner or commissioners the like sum of $40,000, such annual deposits to be continually invested and compounded with the interest thereof for the increase of the said sinking fund until the maturity of said bonds; such sinking-fund moneys shall, from time to time, under the orders of the party of the first part, be invested in the purchase of the bonds hereby secured, or such other bonds as shall be designated by the party of the first part, with the consent of the said parties of the second part, and the money accruing on any and all of such investments for interest, as fast as the same shall be received, shall be added and paid into said sinking fund, and compounded therein continually, and reinvested in like manner with the other monies of said fund, and the same shall be used solely to redeem and eventually pay off said bonds herein and hereby secured. That the board of directors of said railroad company, party of the first part, shall have entire control over the management of said sinking fund, and every person in charge of, or connected with the same, and shall from time to time direct in what bonds or security it shall be invested, and at what price or rates, and how it shall be kept, and the manner of keeping the accounts thereof; and shall require ample se-

curity to be given to them by any person in charge of its moneys, or its securities or bonds, for its safe-keeping:

Provided, That no securities shall be purchased for said fund other than the bonds secured hereby, without the consent of the parties of the second part, as aforesaid.

Fourteenth. And the said party of the first part, for the considerations aforesaid, hereby further covenants and agrees to and with the said parties of the second part, that it, the said party of the first part, shall, and will, at all times hereafter, observe, perform, and keep all and every the conditions, covenants, and provisions herein contained, to be, by the said party of the first part, performed and kept.

153 Fifteenth. If the party of the first part shall well and truly, pay the sums of money herein required to be paid by the said party, and all interest thereon, and at the times and in the manner hereinbefore specified, and shall well and truly keep and perform all the things herein required to be kept and performed by the said party of the first part, according to the true intent and meaning of these presents, then and in that case the estate, right, title, and interest of the said parties of the second part, and of their successors in the trust hereby created, shall cease, determine, and become absolutely void; otherwise to be and remain in full force and virtue.

Sixteenth. It is mutually agreed by and between the parties hereto, as a condition on which the parties of the second part have assented to these presents, that said trustees shall be responsible for gross negligence or wilful default only; that they shall not be in any manner responsible for any default or misconduct of each other; that they shall not be held obliged by the terms of this instrument to demand and take actual possession of and operate the road and premises hereby granted and demised except at their own option; that said trustees or their successors in office shall not be required to act in the execution of any of the other trusts hereby created, unless the parties requesting their action shall give them sufficient indemnity against the charges and expenses to be incurred; that the said trustees or trustee shall be entitled to receive a reasonable allowance for any service which may be rendered by them or him in the execution and enforcement of the trusts hereby created, and for all expenses, counsel fees, and other necessary charges to which they or he may be subject; that either of said trustees may resign and discharge himself of the trust created by these presents, by notice in writing to the party of the first part, three months before such resignation shall take effect, or such shorter time as they may accept as adequate notice.

154 In testimony whereof, the said party of the first part has caused its corporate seal to be hereto affixed, and these presents to be attested by the signatures of its president and secretary; and the parties of the second part, to testify their acceptance of the said trusts, have hereunto subscribed their names on the day and year hereinbefore written.

[SEAL.] H. PRICE, *President.*

W. A. PRICE, *Secretary.*

[SEAL.] J. EDGAR THOMSON,

[SEAL.] W. DENNISON,

Trustees.

Witnesses:

HENRY C. SPACKMAN.

W'M M. SPACKMAN.

P. W. HUNTINGTON.

E. C. SMITH.

STATE OF IOWA,
County of Scott, ss:

Be it remembered, that on this first day of July, in the year of our Lord one thousand eight hundred and seventy-one, before me, a notary public in and for the county and State aforesaid, personally came Hiram Price, president, and William H. Price, secretary, of the Davenport and S't Paul Railroad Company, to me known to be the identical persons described in and who executed the within and foregoing instrument, and severally acknowledged that they executed the same as and for their voluntary act and deed, in their respective capacities as president and secretary of the said The Davenport and S't Paul Railroad Company, and as and for the act and deed of the said corporation; and, furthermore, they did severally acknowledge and declare that the seal attached to said instrument is and was, at the date thereof, the corporate seal of the said corporation, and was so affixed to the said instrument by order of the board of directors of the said company, and that, by like authority, they have executed the same as and for the act and deed of the said company.

155 Given under my hand and seal notarial, at the city of Davenport, in the county and State aforesaid, on the day and year above written.

[SEAL.] ALFRED SULLY,
Notary Public, Scott Co., Iowa.

THE STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

Before me, the undersigned, a notary public, of the State of Pennsylvania, duly commissioned and qualified, personally came the above-named John Edgar Thomson, trustee, and one of the parties of the second part in the foregoing mortgage and deed of trust, and personally known to me as the person who signed the same as such, and acknowledged that he did sign, seal, and execute the same for the uses and purposes therein mentioned. In testimony whereof, I have hereunto set my hand and affixed my notarial seal this sixth day of July, A. D. 1871.

[SEAL.] HENRY C. SPACKMAN,
Notary Public.

STATE OF OHIO,
Franklin Co., ss:

Before me, the undersigned, a notary public of the State of Ohio, duly commissioned and qualified, personally came the above-named William Dennison, trustee, and one of the parties of the second part in the foregoing mortgage and deed of trust, and personally known to me as the person who signed the same as such, and acknowledged that he did sign, seal, and execute the same for the uses and purposes therein mentioned. In testimony whereof, I have hereunto set my hand and affixed my notarial seal this first day of July, anno Domini 1871.

[SEAL.] T. J. JANNEY,
Notary Public in and for Franklin Co., O.

156 Filed for record the 2d day of February, 1872, at 3¼ o'clock p. m.

HENRY HARGER, *Recorder.*

STATE OF IOWA,
Delaware County, ss:

This instrument was filed for record this 7th day of February, 1872,

at 3.15 o'clock p. m., and recorded in book B of mortgages of town lots, on pages 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, and 485.

HENRY HARGER, *Recorder.*

Mortgage.

D. & S'T PAUL R. R. Co.
vs.
JOHN EDGAR THOMSON ET AL.

This indenture, made on the first day of July, in the year of our Lord one thousand eight hundred and seventy-one, between the Davenport and S't Paul Railroad Company, a corporation organized and formed by and under the laws of the State of Iowa, party of the first part, and John Edgar Thomson, of the city of Philadelphia, in the State of Pennsylvania, and William Dennison, of the city of Columbus, in the State of Ohio, parties of the second part, witnesseth that whereas the said party of the first part is authorized by law to borrow all such sum or sums of money as shall be necessary for the construction, equipment, and maintenance of its road, and to convey all its corporate property, franchises, and effects by mortgages and deeds of trust, to secure payment of all such indebtedness as shall be so contracted by it.

And whereas the said party of the first part has, by a resolution of its board of directors, duly authorized and empowered its president and secretary to execute, and in its corporate name to issue bonds, to be designated first mortgage bonds, to be secured by a mortgage
157 or deed of trust, in such form and with such covenants and conditions as the said president should deem most desirable for the best interests of the said corporation, for the purpose of securing the necessary means to iron and equip its said railroad and a sinking fund of $40,000 per annum, to begin July 1st, 1875; the said bonds to be issued at a rate not to exceed the sum of $20,000 for each mile of the said railroad, upon which the work of grading, bridging, and tieing shall have been completed, and to be issued from time to time as the said work shall progress.

And whereas the said resolution authorized the said president to designate the trustees, and John Edgar Thomson, of Pennsylvania, and William Dennison, of Ohio, having been designated by him as such trustees, to whom the said property of the said corporation should be conveyed to securre the payment of the principal and interest of the said bonds so to be issued, to incorporate in such mortgage or deed of trust as should be executed for the purpose aforesaid such covenants and conditions as should be deemed by him necessary and proper to promote and sustain public confidence in the security of the said bonds, and fix the rate of interest which the said bonds should bear.

And whereas the said president has determined to issue the said bonds in the said sums of $1,000 each, payable at the agency of the said railroad company in the city of New York, on the first day of July, in the year of our Lord one thousand nine hundred and eleven, bearing interest at the rate of seven per centum per annum, payable semi-annually in New York, London, or Frankfort, at suitable agencies, to be selected in said cities by said railroad company, and also make both the principal and interest of the said bonds payable in gold coin of the United States of America, of or equal to the present standard, and to have the said
158 bonds duly prepared and deposited with the said parties of the

second part, to be delivered over by them to the treasurer of the said company, on the order of the president in an amount, from time to time not to exceed the sum of $20,000 for each mile of the said road upon which the work of grading, bridging, and tieing shall have been completed, which said bonds are in the form following, that is to say:

Form of bond.

$1,000.] Whole issue, $6,000,000. [No.

UNITED STATES OF AMERICA, STATE OF IOWA.

Seven per cent. first-mortgage sinking-fund bond. The Davenport and S't Paul Railroad Company.

The Davenport and S't Paul Railroad Company, a corporation existing under and by authority of the laws of the State of Iowa, promises to pay to John Edgar Thomson or bearer, on the first day of July, one thousand nine hundred and eleven, in the city of New York, one thousand dollars in United States gold coin, of or equal to the present standard, with interest thereon at 7 per cent. per annum, free of United States taxes, semi-annually, on the first days of January and July, in like gold coin, upon presentation and surrender of the annexed coupons therefor, such interest to be paid either in New York, London, or Frankfort, at suitable agencies to be hereafter named in each of those cities, at the option of the holders, as specified in the coupons. In case of default in payment of such interest when due, and continuance of such default for sixty days after demand, the principal of this bond will be subject to become due and payable upon the condition provided in the trust-deed hereinafter mentioned.

This bond is one of six thousand bonds for one thousand dollars each, of like tenor and date, numbered from one to six thousand inclusive, to be issued on the said railroad, at the rate of twenty thousand dol-
159 lars per mile, as from time to time the road shall progress, from the city of Davenport, in the State of Iowa, to the city of S't Paul, in the State of Minnesota, it being expressly understood that said issue of bonds shall not exceed the amount named per mile, and shall only be issued as the road shall progress.

The owner of this bond shall have the right at any time to convert it into the stock of the company at par. The payment of this bond is secured by a mortgage or deed of trust of the company on its road-bed, depot grounds and buildings, rolling-stock, machinery, franchises, and all its property of every kind, as also net incomes, acquired and to be acquired, to John Edgar Thomson, of Pennsylvania, and William Dennison, of Ohio, trustees, dated July 1st, 1871, and duly recorded in all the counties through which the road is being constructed. This bond is, moreover, secured by a sinking fund of $40,000 per annum, to begin July 1st, 1875, to be set apart and increased annually, for the redemption of the said bonds.

This bond is transferable by delivery, but it may be registered as to its ownership on a registry to be kept by the company.

After a registry of ownership, certified hereon by the transfer agent of the company, no transfer shall be valid unless made on the books of the company, except if the last transfer be to bearer, transferability by delivery shall be restored; subject to successive registration and transfers to bearer as aforesaid, at the option of any lawful holder. This

bond is further authenticated by the endorsement of said trustees hereon.

In witness whereof, the said company has caused the foregoing to be attested, on its behalf, by the signature of its president and sec-
160 retary, and its corporate seal to be affixed hereto, at Davenport, Iowa, this first day of July, A. D. 1871.

President.

Secretary.

Form of coupon.

£7. 5*s*. 10*d*. $35.00. Fl. 87. 30.

The Davenport and S't Paul Railroad Company will pay to the bearer as he may elect, in the city of New York, thirty-five dollars, United States gold coin; or in London, seven pounds five shillings and ten pence sterling; or in Frankfort O. M., eighty-seven florins and thirty krutzers; free of United States taxes, on the first day of January, 18—, being six months' interest on bond No. .

Secretary.

Form of trustees' certificate.

The undersigned hereby certify that this bond is one of the series of bonds described in and secured by the within mentioned deed of trust or mortgage, bearing date the first day of July, A. D. 1871.

Trustees.

And to each of the said bonds there is to be affixed the requisite United States internal-revenue stamp. And, whereas, the said board of directors of the Davenport and S't Paul Railroad Company have formally passed and adopted a resolution, authorizing the president and secretary of the said company to execute in its corporate name and to affix thereto its corporate seal, a deed of trust to the said John Edgar Thomson and William Dennison to
161 secure the payment of the principal and interest of the said bonds, as the same shall become due, according to the tenure and effect thereof. Now, therefore, this indenture witnesseth that the said The Davenport and S't Paul Railroad Company, for and in consideration of the premises and of the sum of one dollar paid to it this day by the said parties of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of the principal and interest of the said bonds, as the same shall become due and payable, according to the tenor and effect thereof, and of the said coupons thereto severally annexed, hath granted, bargained, and sold, and by these presents doth grant, bargain and sell, convey, release, and confirm unto the said parties of the second part, and to their successor or successors, as trustees, all and singular, the road, bridges, and superstructure of the said The Davenport and S't Paul Railroad, including all branches, side tracks, additions, turnouts, rights of way, depot grounds, coal lands, timber lands, and other lands, now owned and that hereafter may be acquired by said party of the first part; all depots,

station houses, grain houses, engine houses, car houses, water-tanks, freight houses, grain elevators, wood houses, coal houses, car shops, and machine shops, and all other buildings whatsoever, now erected or hereafter to be erected. Also, all kinds of machinery and tools now held and owned, or hereafter to be acquired by said party of the first part, for use in connection with the said railroad, including all locomotives, tenders, cars, or other rolling stock or equipment and all tools, implements, fuel, and materials of every kind, used, or procured for use, in the constructing, operating, repairing, or replacing any part or parcel of the said railroad, or any part of its appurtenances; also, all property and franchises connected with or relating to the said railroad, or any part of its business, in any wise whatsoever, which are now held or may be hereafter in any way acquired by the said party of the first part; and also, all rights, claims, and benefits in or to any lease, con-
162 tract or agreement, now made, or which may be hereafter made by the said first party, with any person or persons whomsoever; together with all and singular the tenements and appurtenances thereto belonging, or in any wise appertaining, and the reversions, remainders, tolls, incomes, rents, issues and profits thereto; and also all the estate, right, title, and interest whatsoever, as well at law as in equity, of the said party of the first part, of, in, to, or out of the same, and every part and parcel thereof:

To have and to hold the premises above particularly described and set forth with the said parties of the second part, and to their successor or successors, as trustee or trustees. In trust, nevertheless, for the uses and purposes hereinafter set forth and expressed, and upon the terms, covenants, agreements, and conditions following; that is to say:

First. The actual possession, occupation, and management, and the use and control of the said railroad, and of all the appurtenances thereof, shall be, remain and lie, with the said party of the first part, without molestation or interference by or from the parties of the second part, or their successor or successors in the said trust, until default be made in the payment of the principal of the said bonds, or some of them, or until default be made in respect to something herein required to be done, by the said party of the first part, and until such default be made, as aforesaid, the said party of the first part shall take and use all the earnings, incomes, profits, rents, tolls, and issues of the premises, and dispose of the same in any manner not inconsistent with the terms of this instrument.

Second. The bonds which shall be executed and issued by the said party of the first part, under the provisions of this instrument, and therein recited, shall be delivered to said trustees to be certified by them as trustees, said certificate to be signed in the proper handwriting of at least of one of the said trustees, and no bond shall be valid
163 or binding, or be benefited by the provisions hereof, unless the same shall be certified by the said trustees in form aforesaid; and the said trustees shall not at any time certify or allow to be issued any bonds in excess of the rate of twenty thousand dollars for each mile of the said road, upon which the work of grading, bridging and tieing shall have been finished and completed.

And the said parties do hereby further mutually grant, covenant, promise, and agree to and with each other, that, although by reason of the terms and limitations in these presents expressed, it shall be unlawful for the trustees to certify any part of the issue of bonds herein provided for; nevertheless, upon deposit of the purchase money thereof by the pur-

chaser, as hereinafter provided, the bonds so purchased shall be certified by the trustees and issued to such purchaser.

Provided always that the purchase money therefor shall be deposited to the credit of the trustees in some banking-house in the city of New York or Philadelphia, to be named by both the purchasers and the trustees, which said purchase money shall be used only in payment for iron and equipment of said railroad, at a rate not to exceed the sum of twenty thousand dollars for each mile of the said railroad upon which the work of grading, bridging, and tieing shall have been completed, and be paid from time to time, as the said work shall progress, upon written direction of the trustees.

Third. In case default shall be made in the payment of any of the interest coupons annexed to any of the foregoing bonds, according to the tenor thereof, and if such default shall continue for the period of six months, it shall be lawful for the parties of the second part, by their duly authorized officer, agent, or attorney, upon the request of the person or persons owning and holding one-fourth in amount of such delinquent interest coupons, made known to the said parties of the second part in writing, signed by the person or persons therein interested, or by his or their lawfully constituted agents or attorney, to enter into and
164 upon all and singular the premises hereby conveyed, and each and every part thereof, and to have, hold, and use the same, under such superintendent, manager, receiver, or agent as the parties of the second part may select to conduct the business of the said railroad and its branches, and to exercise the franchises pertaining thereto and to make from time to time all repairs, replacements, additions, and improvements thereto as may seem judicious; and to collect all earnings, dues, freights, incomes, rents, tolls, issues, and profits of the same, and of every part thereof, and after deducting the necessary expenses of operating the said railroad, and of conducting the business thereof, and of all the said repairs, replacements, additions, and improvements, and of all taxes, assessments, or liens upon the said premises, or any part thereof, as well as a just compensation for their or his own services, to apply the moneys arising, as aforesaid, to the payment of interest coupons in the order in which they shall have respectively become due; and after paying all such past due coupons, and all installments or balances thereof, to apply the remainder of said moneys to the satisfaction of the principal of the aforesaid bonds, which may be due and unpaid, rateably, and without discrimination or preference.

Fourth. In case default shall be made as aforesaid, and shall continue as aforesaid, it shall also be lawful for the said parties of the second part, after entry as aforesaid, or without entry, on the request of the person or persons owning and holding the majority in amount of the said delinquency, expressed in writing to the said parties of the second part, to sell and dispose of the premises hereby conveyed at public auction, in the city of New York, or at such place as the parties of the second part may designate, having first given notice of the time and place of such sale by advertisement, published not less than once a week, for six months, in one or more newspapers published in each of the cities of New York and Davenport, and to adjourn the said sale from time to time, by announcement at the time and place adver-
165 tised, without other notice, and to make and deliver unto the purchaser or purchasers thereof, good and sufficient deeds, conveyance, or other assurance in the law, to vesst in the said purchaser or purchasers of the said premises an absolute estate in the said premises in fee simple; which sale, so made, as aforesaid, shall be a perpetual

ien, both in law and in equity, against the said party of the first part, and all and every other person or persons claiming or to claim the same by, from, through, or under the said party of the first part; and after deducting from the proceeds of such sale just allowance for all the expenses thereof, including a reasonable amount for attorney's fees, and any other necessary expenses incurred by the said trustees in managing the business of the said railroad, while in possession, or in arranging the sale thereof, to apply the remaining proceeds to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid, whether or not the same shall have previously become due, and the interest which shall, at that time, have accrued on the said principal, and be unpaid, without discrimination or preference, but rateably to the aggregate amount of such unpaid principal and such accrued and unpaid interest in United States gold coin at par; and if, after satisfaction thereof as aforesaid, a surplus of the said proceeds shall remain, to pay the same over to the party of the first part.

Fifth. At any sale of the aforesaid property, or any part thereof, whether made under the power herein granted or by judicial authority, the parties of the second part may bid for and purchase the property so sold, or any part thereof, for and on behalf of the holders of the bonds hereby secured and then outstanding, in proportion to the respective interests of such bondholders.

Sixth. In case default shall be made in payment of any half-year's interest on any of the aforesaid bonds, according to the tenor and effect of the coupons thereto annexed, and if such default shall con-
166 tinue for the period of six months after such coupons shall have become due, and the payment thereof shall have been demanded, then the principal of all the bonds secured hereby, if a majority in interest of all the holders of the said bonds shall so direct, in writing, before the interest so in arrears shall have been paid, shall be declared by the said parties of the second part to be immediately due and payable, and thereupon the same shall become due and payable, anything contained in the said bond or herein to the contrary notwithstanding.

Seventh. The said party of the first part shall from time to time, and as often as thereunto requested by the said trustees, or their successor or successors in the said trust, execute, acknowledge, and deliver all such further deeds, conveyances, and acceptances as shall be necessary for the better assuring unto the trustees aforesaid, or their successors, the said railroad and equipments, rights and equities, hereinbefore mentioned, or intended so to be, and all other property and things whatsoever which may be hereafter acquired for use in connection with the same or any part thereof, and all franchises now held or hereafter to be acquired, including the franchise to be a corporation.

Eighth. The said trustees and their successors shall have power in their discretion, upon the written request of the party of the first part, to convey by way of release or otherwise, to the person or persons designated by the said party of the first part, any lands acquired or held for the purpose of stations, depots, shops, or other buildings; any land or property which, in the judgment of the said trustees for the time being, shall not be necessary for use in connection with the said railroad, or which may have been held for a supply of fuel, gravel, or other material, and also to convey as aforesaid, on like request, any land not occupied by the track, which may become disused by reason of a change of the location of any station-house, depot, shop, or building con-
167 nected with the said railroad, and such lands occupied by the track and adjacent to such station-house, depot, shop, or other

building as the said party of the first part may deem it expedient to disuse or abandon by means of such change, and to consent to any such change, and to such other changes in the location of the track, or depots, or other buildings as in their judgment shall have become expedient; and to make and deliver the conveyances necessary to carry the same into effect; but any proceeds from such sales are to be placed at the disposal of the trustees to be by them applied to the sinking fund, and any land which may be acquired for permanent use, in substitution for any so released, shall be conveyed to the said trustees upon the trusts of these presents; and the said trustees, for the time being, shall also have full power to allow the said party of the first part from time to time to dispose of according to their discretion such portions of the equipments, machinery, and implements at any time held or acquired for the use of the said railroad as may have become unfit for use, replacing the same by new, which shall be conveyed to the said trustees, or otherwise made subject to the operation of these presents.

Ninth. It is hereby declared and agreed that it shall be the duty of the trustees aforesaid, and their successors, to exercise the power of entry hereby granted, or the power of sale hereby granted, or both, or to take the appropriate proceedings in equity, or at law, to enforce the rights of the holders of the said bonds, under these presents, upon the written request hereinbefore mentioned, when the person or persons making the same shall furnish to the said trustees a proper indemnification against the cost and expenses to be incurred by them therein.

" Tenth. It is mutually agreed by and between the parties hereto that the words 'trustees' or 'trustee,' respectively, as used in these
168 presents, shall be construed to mean the persons or person who, for the time being, shall be charged with the execution of the trusts under these presents, whether such persons or person be the parties of the second part hereto, or either of them, or successors or successor of the said parties of the second part, or either of them, in said trust. And it is further mutually agreed that each of the said trustees shall be entitled to just compensation for any and all services which he shall hereafter render in his trust, to be paid by the said party of the first part, or out of the income of the trust property; and that neither of the said trustees shall be responsible for the default or misconduct of the other or for the default or misconduct of any agent appointed in pursuance of these presents, if such agent be selected with reasonable care. And it is hereby further agreed that either of the said trustees may resign, and be discharged from the performance of the trust created by these presents, by giving notice in writing to the said party of the first part, and to his associate trustee, if there be such, of his intention so to resign, to be served at least three months before the time limited therein for the taking effect of such resignation; and that the said trustees, or either of them, may be removed by the holders of a majority in interest of the whole amount of said bonds, by an instrument in writing, signed by such majority in interest. And it is further agreed that in case at any time hereafter the said trustees, or either of them, or any trustee hereafter appointed, shall die, or resign, or be removed, as herein provided, or otherwise, or shall become incapable or unfit to act in said trust, a successor to such trustee shall be appointed by the holders of a majority in interest of the total amount of said bonds then outstanding, by an instrument in writing duly executed by such holders: that in case a vacancy shall at any time occur in said trust, by death, resignation, or otherwise, the surviving or con-
169 tinuing trustee shall, during such vacancy, be vested with all the rights, powers, and authorities granted by these presents to the

said parties of the second part; that any act or thing which is herein made the duty of the said trustees to do, as distinguished from matters in their discretion, may be done by one of the said trustees as validly as by both, in case of the inability, refusal, or unreasonable delay of either of them to join in doing the same; and that, upon the resignation or removal of any trustee, and the appointment of another trustee in his place, all the estate and interest, rights, powers, and authorities, under this indenture, of the trustee so resigning or being removed shall be transferred to and become vested in the new trustee so appointed, without any further assurance or conveyance; but the trustee so resigning or being removed shall, on the written request of the party of the first part, or of the new trustee who may be appointed, immediately execute a proper deed or deeds of conveyance to vest in such new trustee all the estate and interest, rights, powers, and authorities which were vested in or held by such resigning or removed trustee, under or by virtue of these presents; provided, nevertheless, and it is hereby agreed and declared that, in case it shall at any time hereafter prove impracticable to appoint a trustee hereunder, in the manner hereinbefore provided, and that a vacancy in said trust shall remain unfilled for the space of sixty days, application on behalf of all the holders of the bonds secured hereby may be made, on reasonable notice, in writing, to the said party of the first part, and to the surviving and continuing trustee, if there be such, by holders of said bonds to the aggregate amount of one hundred thousand dollars to any court of competent jurisdiction for the appointment of a new trustee or new trustees."

Eleventh. The said party of the first part, in consideration of
170 the premises, and of the said sum of one dollar duly paid as aforesaid, hereby further covenants and agrees to and with the said parties of the second part and their successor or successors in the said trust, to have an office or agency in the city of New York for the payment of the principal, and an agency in each of the cities of New York, London, and Frankfort-on-the-Maine, for the payment of interest of the bonds hereby secured, as the same shall respectively become due and payable.

Twelfth. The said party of the first part, for the considerations aforesaid, hereby further covenants and agrees to and with the said parties of the second part and their successor or successors that the proceeds of the said bonds shall at all times be faithfully applied to the uses and purposes hereinbefore specified, and to no other use or purpose whatsoever.

Thirteenth. The said party of the first part agrees and covenants with the parties of the second part and their successors that it will create a sinking fund for the redemption of the whole amount of the bonds hereby secured, and will therefore set apart and deposit with a sinking-fund commissioner or commissioners, to be appointed by the party of the first part, on the first day of July, 1875, the sum of $40,000, and will on the first day of July of each and every year thereafter deposit with said commissioner or commissioners the like sum of $40,000, such annual deposits to be continually invested and compounded with the interest thereof for the increase of the said sinking fund until the maturity of said bonds. Such sinking-fund moneys shall, from time to time, under the orders of the party of the first part, be invested in the purchase of the bonds hereby secured, as long as the same can be purchased under or at par, and when this cannot be done, then in such other bonds as shall be designated by the party of the first part, with the consent of

the said parties of the second part, and the money accruing on
171 any and all of such investments for interest, as fast as the same shall be received, shall be added and paid into such sinking fund, and compounded therein continually, and reinvested in like manner with the other monies of said fund, and the same shall be used solely to redeem and eventually pay off said bonds herein and hereby secured. That the board of directors of said railroad company, party of the first part, shall have entire control over the management of said sinking fund and every person in charge of or connected with the same, and direct how it shall be kept, and the manner of keeping the accounts thereof, and shall require ample security to be given to them by any person in charge of its moneys or its securities or bonds, for its safe keeping.

Provided, that no securities shall be purchased for said fund other than the bonds secured hereby, without the consent of the parties of the second part, as aforesaid.

Fourteenth. And the said party of the first part, for the considerations aforesaid, hereby further covenants and agrees to and with the said parties of the second part, that it, the said party of the first part, shall and will, at all times hereafter, observe, perform, and keep all and every the conditions, covenants, and provisions herein contained, to be, by the said party of the first part, performed and kept.

Fifteenth. If the party of the first part shall, well and truly, pay the sums of money herein required to be paid by the said party, and all interest thereon, and at the times and in the manner hereinbefore specified, and shall well and truly keep and perform all the things herein required to be kept and performed by the said party of the first part, according to the true intent and meaning of these presents, then, and in that case, the estate, right, title, and interest of the said parties of the second part, and of their successors in the trust hereby created, shall cease, determine, and become absolutely void; otherwise to be and remain in full force and virtue.

172 Sixteenth. In all cases in which the trustees may be required to act, they are hereby invested with full powers of arbitrament and of compromise, and of appointing agents and attorneys to act in their behalf.

In testimony whereof the said party of the first part has caused its corporate seal to be hereto affixed and these presents to be attested by the signatures of its president and secretary; and the parties of the second part, to testify their acceptance of the said trusts, have hereunto subscribed their names on the day and year first hereinbefore written.

DAVENPORT & S'T PAUL RAILROAD COMPANY.
[SEAL.] By GEO. H. FRENCH, *President.*

Attest:
[SEAL.] W. H. PRICE, *Secretary D. & S't P. R. R. Co.*

J. EDGAR THOMSON, *Trustee.* [SEAL.]
W. DENNISON, *Trustee.* [SEAL.]

Signed, sealed, and delivered in presence of—
LEWIS SANDERS.
GARDINER MCCANDLESS.

CITY OF NEW YORK,
STATE OF NEW YORK, } *ss:*
UNITED STATES OF AMERICA.

On this sixteenth day of May, A. D. 1872, before me, a notary publci

duly commissioned by the governor of the State of New York, and duly qualified to administer oaths and take acknowledgment of deeds for the county of New York, personally appeared George H. French and W. H. Price, to me known, and known to me to be the identical president and secretary of the Davenport and S't Paul Railroad Company, and known to me to be the persons who executed the foregoing instrument, who, being by me duly and severally sworn, said that they reside in the
173 city of Davenport, State of Iowa; that they were respectively the president and secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was affixed by order of the board of directors of said company, and that they signed their names thereto by the like order as president and secretary, respectively, of said company; and the said president and secretary thereupon severally acknowledged the execution of the foregoing instrument as the voluntary act and deed of said company; and on the same day, before me, the said notary public, personally appeared William Dennison, to me known, and known to me to be the identical person and trustee described in and who executed the foregoing instrument, who duly acknowledged as such trustee that he executed the same as his voluntary act and deed; and on the fourteenth day of May, A. D. 1872, before me, the said notary public, personally appeared J. Edgar Thomson, to me known, and known to me to be the identical person and trustee described in, and who executed the foregoing instrument, who duly acknowledged as such trustee that he executed the same as his voluntary act and deed.

In witness whereof I have hereunto set my hand and affixed my seal'
[SEAL.] LEWIS SANDERS,
Notary Public, New York County.

Filed for record 4th June, 1872, at 7½ o'clock a. m.
HENRY HARGER, *Recorder.*
By J. L. STRUE, *Deputy.*

Amendment to mortgage.

THE DAVENPORT AND S'T PAUL R. R. CO.
to
JOHN EDGAR THOMPSON.

This indenture, made the first day of July, in the year of our Lord one thousand eight hundred and seventy-one, by and between the Davenport and S't Paul Railroad Company, a corporation formed, or-
174 ganized, and existing by and under the laws of the State of Iowa, party of the first part, and John Edgar Thomson, of the city of Philadelphia, in the State of Pennsylvania, and William Dennison, of the city of Columbus, in the State of Ohio, parties of the second part:

Whereas, the said party of the first part has made, executed, and delivered to said parties of the second part, a certain indenture of even date with these presents, and therein called a mortgage or deed of trust to secure the payment of its first mortgage bonds as in said indenture mentioned:

And whereas it is desirable for the better protection of the rights of purchasers and holders of said bonds that said mortgage or deed of trust should be amended in the manner hereinafter set forth:

Now, therefore, these presents witness that, in consideration of the premises and of one dollar to each by the other in hand paid, the said

parties of the first part and the said parties of the second part do hereby mutually grant, covenant, promise, and agree to and with each other, as follows:

That the said indenture of mortgage or deed of trust shall be, and shall for all intents and purposes be considered and taken to be, amended in the following respects:

First. That in lieu of the tenth and sixteenth articles thereof, the said sixteenth article be omitted entirely from said indenture, and the said tenth article as here contained be amended and read as follows:

"Tenth. It is mutually agreed by and between the parties hereto that the words 'trustees' or 'trustee,' respectively, as used in these presents, shall be construed to mean the persons or person who, for the time being, shall be charged with the execution of the trusts under these presents, whether such persons or person be the parties of the second part hereto, or either of them, or successors or successor of the said parties of the
175 second part, or either of them, in said trust. And it is further mutually agreed that each of the said trustees shall be entitled to just compensation for any and all services which he shall hereafter render in his trust, to be paid by the said party of the first part, or out of the income of the trust property; and that neither of the said trustees shall be responsible for the default or misconduct of the other, or for the default or misconduct of any agent appointed in pursuance of these presents, if such agent be selected with reasonable care. And it is hereby further agreed that either of the said trustees may resign, and be discharged from the performance of the trust created by these presents, by giving notice, in writing, to the said party of the first part and to his associate trustee, if there be such, of his intention so to resign, to be served at least three months before the time limited therein for the taking effect of such resignation; and that the said trustees, or either of them, may be removed by the holders of a majority in interest of the whole amount of said bonds, by an instrument in writing signed by such majority in interest. And it is further agreed that in case at any time hereafter the said trustees, or either of them, or any trustee hereafter appointed, shall die, or resign, or be removed, as herein provided, or otherwise, or shall become incapable or unfit to act in said trust, a successor to such trustee shall be appointed by the holders of a majority in interest of the total amount of said bonds then outstanding, by an instrument in writing duly executed by such holders; that in case a vacancy shall at any time occur in said trust, by death, resignation, or otherwise, the surviving or continuing trustee shall, during such vacancy, be vested with all the rights, powers and authorities granted by these presents to the said parties of the second part; that any act or
176 thing which is herein made the duty of the said trustees to do, as distinguished from matters in their discretion, may be done by one of the said trustees as validly as by both, in case of the inability, refusal, or unreasonable delay of either of them to join in doing the same; and that upon the resignation or removal of any trustee, and the appointment of another trustee in his place, all the estate and interest, rights, powers, and authorities, under this indenture, of the trustee so resigning or being removed, shall be transferred to and become vested in the new trustee so appointed, without any further assurance or conveyance; but the trustee so resigning or being removed shall, on the written request of the party of the first part, or of the new trustee who may be appointed, immediately execute a proper deed or deeds of conveyance to vest in such new trustee all the estate and interest, rights, powers, and authorities which were vested in or held by such resigning or removed trustee under or by vir-

tue of these presents; provided nevertheless, and it is hereby agreed and declared, that in case it shall at any time hereafter prove impracticable to appoint a trustee hereunder, in the manner hereinbefore provided, and that a vacancy in said trust shall remain unfilled for the space of sixty days, application on behalf of all the holders of the bonds secured hereby may be made, on reasonable notice, in writing, to the said party of the first part, and to the surviving and continuing trustee, if there be such, by holders of said bonds to the aggregate amount of one hundred thousand dollars to any court of competent jurisdiction for the appointment of a new trustee or new trustees."

Second. And also that in the trustees' certificate endorsed on said bond at the request of the holder or holders thereof at any time shall be added the words, "and the supplemental deed of the same date."

Third. And also that article second of said indenture of mortgage or deed of trust as therein contained be amended and made to read as follows:

177 "Second. The bonds which shall be executed and issued by the said party of the first part, under the provisions of this instrument and therein recited, shall be delivered to said trustees, to be certified by them, as trustees, and no bond shall be valid or binding, or be benefitted by the provisions hereof, unless the same shall be certified by the said trustees in the form aforesaid; and the said trustees shall not at any time certify or allow to be issued any bonds in excess of the rate of twenty thousand dollars for each mile of the said road upon which the work of grading, bridging, and tieing shall have been finished and completed, save as hereinafter provided."

And the said parties hereby further mutually grant, covenant, promise, and agree to and with each other that if at any time before the whole work of grading, bridging, and tieing the entire line of the railroad in said indenture mentioned shall have been completed, any part of the bonds in said indenture provided for cannot be issued, by reason of the terms and limitations therein expressed, and if the purchasers or purchaser of such bonds shall make deposit of the purchase-money thereof in the manner hereinafter provided, then and in that case such bonds shall be issued and certified by the trustees, and delivered to the purchasers thereof.

Provided always that the purchase-money therefor shall be deposited to the credit of the trustees in some banking-house in the city of New York or Philadelphia, to be named by both the purchasers and trustees, which said purchase-money shall be used only in payment for iron and equipment of said railroad, at a rate not to exceed the sum of twenty thousand dollars for each mile of the said railroad upon which the work of grading, bridging and tieing shall have been completed, and be paid from time to time, as the said work shall progress, upon written direction of the trustees.

178 In witness whereof the said Davenport and S't Paul Railroad Company hath caused these presents to be sealed with its common seal and to be subscribed by its president and secretary, and the said John Edgar Thomson and William Dennison have hereunto set their hands and seals the day and year first above written.

[SEAL.] GEO. H. FRENCH, *Pres't.*

W. H. PRICE, *Sec'y.*

J. EDGAR THOMSON,

W. DENNISON, *Trustees.*

STATE OF IOWA,
County Scott, ss:

Be it remembered that on this first day of February, anno Domini one thousand eight hundred and seventy-two, before me, a notary public in and for the said county, personally came George H. French, president of the Davenport and S't Paul Railroad Company, and William H. Price, the secretary thereof, to me known to be the identical persons whose names are subscribed to the foregoing instrument, and in due form of law acknowledged the execution and delivery of the same to be their voluntary act and deed, done by virtue of the power in them vested by a resolution of the board of directors of the said company, to that end duly and amply passed and adopted, as and for the voluntary act and deed of the said the Davenport and S't Paul Railroad Company.

In testimony whereof I have hereunto set my hand and notarial seal the day and year above written.

[SEAL.] ALFRED SULLY,
Notary Public, Scott County, Iowa.

CITY OF PHILADELPHIA,
State of Pennsylvania, ss:

Before me, the subscriber, a notary public in and for the said
179 city of Philadelphia, personally appeared the within-named J. Edgar Thomson, trustee, and in due form of law acknowledged that he executed the foregoing indenture as his voluntary act and deed, and desired that the same might be recorded as such.

In testimony whereof I have hereunto set my hand and notarial seal this third day of February, A. D. 1872.

[SEAL.] HENRY C. SPACKMAN,
Notary Public.

STATE OF OHIO,
Franklin County, ss:

Before me the subscriber, a notary public in and for said county, personally appeared the within named William Dennison, trustee, and acknowledged the signing and sealing of the foregoing mortgage or deed of trust to be his voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal this fifth day of February, A. D. 1872.

T. J. JANNEY,
Notary Public, in and for Franklin Co., O.

Filed for record the 28th day of March, 1872, at 11 a. m.

HENRY HARGER,
Recorder.

EXHIBIT D.

Amendment to mortgage.

DAVENPORT & S'T PAUL RAILROAD CO.
to
JOHN EDGAR THOMSON & WILLIAM DENNISON.

This indenture made the first day of March, in the year of our Lord

one thousand eight hundred and seventy-two by and between the Davenport and Saint Paul Railroad Company, a corporation formed, organized, and existing by and under the laws of the State of Iowa, party
180 of the first part, and John Edgar Thomson, of the city of Philadelphia, in the State of Pennsylvania, and William Dennison, of the city of Columbus, in the State of Ohio, parties of the second part.

Whereas the party of the first part has made, executed, and delivered to said parties of the second part, a certain indenture bearing date the first day of July, one thousand eight hundred and seventy-one, and therein called a mortgage or deed of trust, and at a later day has likewise made, executed, and delivered to said parties of the second part, a deed supplemental to and amendatory thereof, likewise bearing date the first day of July, one thousand eight hundred and seventy-one, to secure the payment of its first mortgage bonds, as in said two deeds mentioned;

And whereas, three thousand of the bonds provided for in said two deeds have been issued by said party of the first part in pursuance of said two deeds before the day of the date of these presents;

And whereas, it is deemed desirable for the better protection of holders of said bonds that said mortgage or deed of trust should be further amended in the manner hereinafter set forth; and that provision be made to enable the holders of the said bonds already issued to exchange the same, upon surrender thereof, for a like amount of bonds of the amended form hereinafter provided for and upon such surrender and exchange to acquire all the rights and benefits secured, and intended to be secured by these presents.

Now, therefore, these presents witness that in consideration of the premises and of one dollar to each by the other in hand paid, the said party of the first part and the said parties of the second part do hereby mutually grant, covenant, promise, and agree to and with each other as follows:

181 That the said indenture of mortgage or deed of trust shall be and shall for all intents and purposes be considered and taken to be amended in the following respects:

First. That in lieu of the tenth and sixteenth articles thereof, the said sixteenth article be omited entirely from said indenture, and the said tenth article as therein contained be amended and read as follows:

"Tenth. It is mutually agreed by and between the parties hereto that the words "trustees" and "trustee," respectively, as used in these presents, shall be construed to mean the persons or person who, for the time being, shall be charged with the execution of the trusts under these presents, whether such persons or person be the parties of the second part hereto, or either of them, or successors or successor of the said parties of the second part, or either of them, in said trust. And it is further mutually agreed that each of the said trustees shall be entitled to just compensation for any and all services which he shall hereafter render in his trust, to be paid by the said party of the first part, or out of the income of the trust property; and that neither of the said trustees shall be responsible for the default or misconduct of the other, or for the default or misconduct of any agent appointed in pursuance of these presents, if such agent be selected with reasonable care. And it is hereby further agreed that either of the said trustees may resign, and be discharged from the performance of the trust created by these presents, by giving notice, in writing, to the said party of the first part, and to his associate trustee, if there be such, of his intention so to resign, to

be served at least three months before the time limited therein for the taking effect of such resignation; and that the said trustees, or either of them, may be removed by the holders of a majority in interest of the whole amount of said bonds, by an instrument in writing, signed by such majority in interest. And it is further agreed, that in case at
182 any time hereafter, the said trustees, or either of them, or any trustee hereafter appointed, shall die, or resign, or be removed, as herein provided or otherwise, or shall become incapable or unfit to act in said trust, a successor to such trustee shall be appointed by the holders of a majority in interest of the total amount of said bonds then outstanding, by an instrument in writing duly executed by such holders; that in case a vacancy shall at any time occur in said trust, by death, resignation, or otherwise, the surviving or continuing trustee shall, during such vacancy, be vested with all the rights, powers and authorities granted by these presents to the said parties of the second part; that any act or thing which is herein made the duty of the said trustees to do, as distinguished from matters in their discretion, may be done by one of the said trustees as validly as by both, in case of the inability, refusal, or unreasonable delay of either of them to join in doing the same; and that upon the resignation or removal of any trustee, and the appointment of another trustee in his place, all the estate and interest, rights, powers, and authorities, under this indenture, of the trustee so resigning or being removed shall be transferred to and become vested in the new trustee so appointed, without any further assurance or conveyance; but the trustee so resigning or being removed shall, on the written request of the party of the first part, or of the new trustee who may be appointed, immediately execute a proper deed or deeds of conveyance to vest in such new trustee, all the estate and interest, rights, powers, and authorities which were vested in or held by such resigning or removed trustee, under or by virtue of these presents; provided, nevertheless, and it is hereby agreed and declared that in case it shall at any time hereafter prove impracticable to appoint a trustee hereunder, in the manner hereinbefore provided, and that a vacancy in said trust shall remain unfilled for the space of sixty days, appli-
183 cation on behalf of all the holders of the bonds secured hereby may be made, on reasonable notice, in writing, to the said party of the first part, and to the surviving and continuing trustee, if there be such, by holders of said bonds to the aggregate amount of one hundred thousand dollars to any court of competent jurisdiction for the appointment of a new trustee or new trustees."

Second. And also the form of bond recited, set forth, and provided for in said mortgage or deed of trust, shall be amended in the following particulars, viz: The clause, "The payment of this bond is secured by a mortgage or deed of trust of the company, on its road-bed, bridges, depot grounds and buildings, rolling-stock, machinery, franchises, and all its property of every kind, as also net incomes, acquired and to be acquired, to John Edgar Thomson, of Pennsylvania, and William Dennison, of Ohio, trustees, dated July 1st, 1871," shall be amended and made to read as follows: "The payment of this bond is secured by a mortgage or deed of trust, bearing date July 1st, 1871, and by a deed supplemental to and amendatory thereof, bearing date March 1st, 1872, executed by said company on its road-bed, bridges, depot grounds and buildings, rolling-stock, machinery, franchises, and all its property of every kind, as also net incomes, acquired and to be acquired, to John Edgar Thomson, of Pennsylvania, and William Dennison, of Ohio, trustees."

And also that the trustees' certificate, endorsed on said bonds, shall be amended and made to read as follows: "The undersigned hereby certify that this bond is one of the series of bonds described in and secured by the within-mentioned mortgage or deed of trust, dated July 1st, 1871, and the deed supplemental to and amendatory thereof, dated March 1st, 1872."

184 Third. And also that article second of said indenture of mortgage or deed of trust, as therein contained, be amended and made to read as follows:

"Second. The bonds which shall be executed and issued by the said party of the first part under the provisions of this instrument, and therein recited, shall be delivered to said trustees to be certified by them as trustees, and no bond shall be valid or binding, or be benefitted by the provisions hereof, unless the same shall be certified by the said trustees in the form aforesaid; and the said trustees shall not at any time certify or allow to be issued any bonds in excess of the rate of twenty thousand dollars for each mile of the said road upon which the work of grading, bridging, and tieing shall have been finished and completed."

And the said parties do hereby further mutually grant, covenant, promise, and agree to and with each other, that no other or further issue of said bonds, in the form provided for in said mortgage or deed of trust, shall be issued by said parties of the first part, or certified by said parties of the second part, and that upon surrender of such of said bonds as have been issued before the day of the date of these presents, said party of the first part will issue and deliver in exchange therefor an equal amount of bonds of the amended form herein above provided for, and the bonds so received in exchange shall thereupon be cancelled, and the obligation thereof extinguished.

And the said parties do hereby further mutually grant, covenant, promise, and agree to and with each other, that although by reason of the terms and limitations in said mortgage or deed of trust and these presents expressed, it shall be unlawful for the trustees to certify any part of the issue of bonds therein provided for; nevertheless, upon deposit of the purchase-money thereof by the purchaser, as hereinafter in these presents provided, the bonds so purchased shall be certified by the trustees and issued to such purchaser.

185 Provided always that the purchase-money therefor shall be deposited to the credit of the trustees in some banking house in the city of New York or Philadelphia, to be named by both the purchasers and the trustees, which said purchase-money shall be used only in payment for iron and equipment of said railroad at a rate not to exceed the sum of twenty thousand dollars for each mile of the said railroad upon which the work of grading, bridging, and tieing shall have been completed, and be paid from time to time as the said work shall progress, upon written direction of the trustees.

In witness whereof the said Davenport & S't Paul Railroad Company hath caused these presents to be sealed with its common seal and to be subscribed by its president and secretary, and the said John Edgar

Thomson and William Dennison have hereunto set their hands and seals the day and year first above written.

[SEAL.] GEO. H. FRENCH,
President.

W. H. PRICE,
Secretary.

J. EDGAR THOMSON,
W. DENNISON,
Trustees.

Signed, sealed, and acknowledged in the presence of—
W'M M. SPACKMAN.
HENRY C. SPACKMAN, as to J. Edgar Thomson.
G. MOODIE.
T. J. JANNEY, as to William Dennison.

STATE OF IOWA,
Scott County:

Be it remembered that on this sixteenth day of March, A. D. 1872, before me, a notary public in and for Scott County, Iowa, duly qualified, personally came George H. French, president, and William H. Price, secretary of the Davenport & S't Paul Railroad Company, to me personally known to be the identical persons whose names are sub-
186 scribed to *be* the foregoing instrument, the one as president and the other as secretary of said company, and severally acknowledged the same to be their voluntary act and deed, and the voluntary act and deed of said company.

Witness my hand and notarial seal the day and year last above written.

[SEAL.] H. A. H. PLAYTER,
Notary Public, Scott Co., Iowa.

CITY OF PHILADELPHIA,
State of Pennsylvania, ss:

Before me, the undersigned, a notary public of the city of Philadelphia, State of Pennsylvania, duly commissioned and qualified, personally came the within named J. Edgar Thomson, trustee, and party of the second part in the foregoing indenture, and who is personally known to me as the person who signed the same as such, and acknowledged that he did sign, seal and execute the same for the use and purposes therein mentioned as his voluntary act and deed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal this seventh day of March, A. D. 1872.

[SEAL.] HENRY C. SPACKMAN,
Notary Public.

STATE OF OHIO,
Franklin County, ss:

Before me, the undersigned, a notary public of the State of Ohio, in and for said Franklin County, personally appeared the within named W'm Dennison, trustee, and a party of the second part in the foregoing indenture, and who is personally known to me as the person who signed the same as such, and acknowledged that he did sign, seal and execute the same for the uses and purposes therein mentioned, as his voluntary act and deed.

187 In witness whereof I have hereunto affixed my hand and notarial seal this fourteenth day of March, A. D. 1872.

[SEAL.] T. J. JANNEY,
Notary Public in and for Franklin Co., Ohio.

Filed for record the 25th day of March, A. D. 1872, at 12 o'clock m.
HENRY HARGER,
Recorder.

STATE OF IOWA,
Delaware County, ss:

I, H. C. Jackson, recorder of Delaware County, in the State of Iowa, do hereby certify that the above and foregoing is a full, true, correct and examined copy of the record of two mortgages from The Davenport and S't Paul Railroad Company to J. Edgar Thomson and William Dennison, and two amendatory mortgages to the same, as the same appears in my office in book "B" of mortgages of town lots, on pages 473, 491, 498, and 510.

Witness my hand this 5th day of August, 1875.

H. C. JACKSON,
Recorder of Delaware Co., Iowa.

188 *Amended decree.*

STATE OF IOWA,
Delaware County, ss:

Be it remembered that at a term of the circuit court of Iowa, holden in and for said county, at Delhi, on the 14th day of October, A. D. 1875, were present the Hon. S. Bagg, sole presiding judge, Abner Dunham, sheriff of said county, and J. B. Satterlee, clerk of said court, when the following proceedings were had, to wit:

THE DELAWARE RAILROAD CONSTRUCTION Company *vs.* THE DAVENPORT AND S'T PAUL RAILROAD Company, John Edgar Thomson and William Dennison, trustees for certain bondholders of said railroad, the Davenport Railway Construction Company, and Lucius Howard.	No. 1141. Equity.

Now, on this 14th day of October, 1875, this cause coming on for hearing upon the motion of the said defendant, William Dennison, trustee, to correct the record and decree entered in *in* this cause at the May term, 1875, of said court, come the several parties, the plaintiff appearing by G. Wattson, esq., its attorney, and the defendant, William Dennison, trustee, by L. M. Fisher, his attorney, when, after hearing the arguments of counsel, and the court being now fully advised in the premises,
189 it is considered that said motion be sustained, and it is therefore ordered that the judgment and decree rendered in this cause at the May term, 1875, of said court, commencing on the 17th day of May, 1875, be, and the same is, corrected, amended, and reformed, and ordered by the court to read and stand as the judgment and decree of this court in lieu of the judgment and decree rendered by the court as aforesaid, as follows, that is to say:

And now, on this 17th day of May, 1875, this cause coming on for hearing on the motion of plaintiff to strike from the files of this cause, in this court, the answer of defendant, William Dennison, trustee, for the want of verification, and the court being now fully advised in the premises, said motion is sustained, and the answer of said defendant William Dennison, trustee, is stricken from the files in this cause. Whereupon, the said plaintiff, by its attorney, files a motion for default against the said defendant, William Dennison, trustee, for want of answer herein. And now, further, on the 19th day of May, 1875, this cause coming on for furthing hearing, comes the said defendant, William Dennison, trustee, and asks leave of court to file, and now files his amended answer.

And now, further, on the 21st day of May, 1875, this cause coming on for further hearing, comes Lewis H. Meyer, by Grant & Smith and L. M. Fisher, and asks to be made a party defendant in this cause, and calls up his motion for that purpose, filed in this cause on the 19th day of May, 1875, whereupon plaintiff, by its attorney, objects to said Meyer being made a party defendant in this cause, for the reason that no evidence of the appointment of said Meyer as trustee is before this court, and said motion and the objections thereto having been duly considered by the court, it is ordered that the application of said Meyer to be made a party defendant be refused, and the objections thereto be, and
190 they are sustained, to which ruling of the court said Meyer by his counsel excepts and asks that his exceptions in this behalf be made a matter of record in this cause, which is accordingly done. Plaintiff now offers in evidence the contract sued on in this cause, whereupon the defendant, William Dennison, trustee, asks leave to file an amended petition and bond for the transfer of this cause to the United States circuit court, a petition and bond for that purpose appearing to have been filed with the clerk of this court on the 20th day of May, 1875, one of the regular days of the present term of court, to wit, on the 20th day of May, 1875, aforesaid; but no notice of the filing of the same having been brought to the court, plaintiff, by its attorney, objects that the bond is insufficient, one surety being an attorney and not eligible as a surety on a bond in court under the law; and further, that the application to transfer this cause is too late, the cause being now reached for trial, and the trial of the same commenced; whereupon the court sustained the objections of plaintiff in this behalf, to which ruling of the court the defendant, William Dennison, trustee, by his counsel, excepts and asks that his exception be made a matter of record, which is accordingly done, when, pending further proceedings in said cause, court adjourns to May 22, 1875.

And now, on this 22d day of May, 1875, it being one of the days of the regular May term, 1875, of said court, the court proceeds with the further hearing of said cause; whereupon defendant, William Dennison, trustee, now moves the court to proceed no further with the trial of said cause and asks that said defendant be allowed to file a new bond for the transfer of said cause to the U. S. circuit court or to deposi tmoney for costs of the same. Plaintiff objects on the ground that the cause is now on trial on its merits. Objection sustained and said defendant, by his counsel, excepts and asks that this his exception be made a matter of record, which is accordingly done; whereupon, plaintiff, by its counsel,
191 asks leave to file reply, to the filing of which defendant, Dennison, by his counsel, objects. Objection overruled, and defendant, Dennison, by his counsel, excepts and asks that this his exception be made a matter of record, which is accordingly done; whereupon

plaintiff files reply, and thereupon defendant, Dennison, by his counsel, asks leave and files his amended answer, and the court now proceeds with the trial of said cause on the issues joined therein, and after full hearing and argument of counsel, the same is duly submitted to the court, and by consent of parties the court takes the same under advisement, with the understanding that judgment shall be rendered by the court in vacation and entered as of the last day of this term. And the court finds the issues in favor of plaintiff, and files and renders his decision that plaintiff's lien is paramount to that of defendant, and orders judgment in favor of said plaintiff.

It is therefore ordered and adjudged and decreed that the lien of said plaintiff is paramount to that of the defendant, William Dennison, trustee, etc.; and it is ordered, adjudged, and decreed that the former decree and judgment of this court, rendered at the May term, A. D. 1874, be confirmed, and that the plaintiff's claim for a mechanic's lien, as prayed in his petitions, be established as against the said defendants upon the property described in the decree in this suit at the February term of this court, A. D. 1874, and as therein established, against the Davenport and S't Paul Railroad Company, and that the defendants be forever barred and foreclosed of and from all right of redemption of, in, or to said property, and every part thereof, and that the rights of plaintiff be declared to be superior and paramount to any and all claims and rights of said defendants to the same or any part thereof; and that the defendant, William Dennison, trustee, etc., pay the costs of the retrial of this suit. Thus ordered, adjudged, and decreed this 14th day of October, A. D. 1875.

192 STATE OF IOWA,
Delaware County, ss:

I, J. B. Satterlee, clerk of the circuit court in and for said county, do certify that the foregoing is a true copy of the proceedings in this cause, wherein the Delaware Railroad Construction Company was plaintiff, and the Davenport & S't Paul Railroad Company and others were defendants, at the October term of said court, A. D. 1875, as the same appears of record in my office.

Witness my hand and the seal of said court, hereto affixed, at my office in Delhi, in said county, on this 18th day of October, 1875.

[SEAL.] J. B. SATTERLEE,
Clerk Circuit Court,
By I. N. SULLIVAN,
Deputy.

193 STATE OF IOWA,
Delaware County, ss:

I, J. B. Satterlee, clerk of the circuit court in and for said county, do hereby certify that the printed document hereto attached is a full, true, and complete copy, except some typographical errors and a few omissions made by the compositors in setting up the same, of the record prepared and certified by me to the supreme court of Iowa in the action in which the same is entitled, including pleadings, evidence, and record entries in said cause up to the final and amended decree therein; and a full, true, and complete copy, except typographical errors as aforesaid, of which I notice but one in said certificate (report for reporter), of the certificate attached by me as clerk as aforesaid to the said transcript prepared and sent by me to the said supreme court of Iowa, and of the

certificate to the reformed or amended decree in said cause. And
194 I further certify that, after having made a careful comparison of the said printed document with the original manuscript prepared by me for the supreme court as aforesaid, I make this certificate with full knowledge of the facts which I hereby certify.

Witness my hand and the seal of said court this 18th day of April, A. D. 1876.

[SEAL.] J. B. SATTERLEE,
Clerk Circuit Court.

195 And on the 3d day of Jan., 1876, appellee files in the office of the clerk of the supreme court of Iowa his additional abstract of record, in words and figures following, to wit:

196 *Appellee's abstract of record.*

In the supreme court of Iowa. October term, 1875. In equity.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY, appellee,
against
THE DAVENPORT & S'T PAUL RAILROAD COMPANY and others, including William Dennison, trustee, appellant.

Appeal from the judgment of the Delaware circuit court.

197 Abstract.

On the 15th day of January, A. D. 1874, the plaintiff filed in the circuit court of Delaware County a petition alleging that plaintiff is a corporation, duly organized under the laws of Iowa, and as such, on or about the 6th day of August, A. D. 1870, said plaintiff entered into a written contract with the Davenport & S't Paul Railroad Company, a corporation similarly organized, for the performance of certain work and the furnishing of certain materials for said railroad, which will more particularly appear from a copy of said contract contained in the statement for a mechanic's lien filed by said plaintiff in the office of the clerk of the district court of Delaware County, Iowa, and a copy of said statement, including a copy of said contract, is hereto annexed and made a part of this petition.

Plaintiff alleges that under the direction and supervision of the engineer of said railroad company said plaintiff performed the work required in said contract, and in every respect complied with the terms and conditions thereof. (See record, pages 2 and 3.)

The petition alleges that plaintiff commenced work on the 29th day of September, A. D. 1870, and further allegations show the amount of work performed, and the quantity and kind of materials furnished for the respective months to the completion of the work, on October 31st, A. D. 1872; also states the amounts and dates of the estimates
198 of the engineer of said railroad company, and refers to copies thereof annexed to said petition, copies of the estimates being included on the pages of record from 30 to 42 inclusive.

Another allegation is this: "And plaintiff says that a disagreement arose between the plaintiff and defendant in relation to the construction of said contract, which was arranged and settled by a subsequent agree-

ment to strike out the following words above the signature of H. Price, to wit: 'All the money for the work hereinbefore specified to be paid by the citizens of Delaware County.' Said agreement to strike out being condensed by the resolutions and proceedings of the board of directors of said railroad company, of which a copy is hereunto annexed, and made a part of this petition, and by the proceedings and resolutions of board of directors of plaintiff, a copy of which is hereunto annexed, marked 'C,' and made a part of this petition." (See record, pages 9 and 10.)

The petition states the respective dates when each five miles of the road were completed. (See record, pages 19 and 20.)

On page 20 is this allegation: "Plaintiff says that said work was performed upon and said materials were furnished for a work of internal improvement, to wit, said railroad; that said work and labor were performed and said materials furnished under a contract with said Davenport & S't Paul Railroad Company, upon the road-bed and bridges and culverts owned by said railroad company, including the road-bed and the land occupied by the depot buildings, side-tracks, and all of the land belonging to said railroad company in Delaware County, Iowa, and used in the operation of said railroad, and the same is still the property of said railroad company; that upon the 20th day of December, 1872, plaintiff filed in the office of the clerk of the district court of Delaware County, Iowa, a statement and account for a mechanic's lien, of which
a copy, marked 'A,' is hereunto annexed and made a part of
199 this petition, and in said statement is included a copy of the contract mentioned in the first paragraph of this petition." (See record, page 20.)

The petition alleges various payments, which show an amount of over $52,000.00 due plaintiff on the contract, after which is this allegation:

"The foregoing amounts comprise all of the payments received upon the indebtedness to plaintiff under said contract, and all credits to which said Davenport & S't Paul Railroad Company are entitled." (See record, page 19.)

Other allegations are contained in the petition, which states that the other defendants, except the railroad company, have or claim liens upon said property, "but the lien to which plaintiff is entitled by virtue of the premises is paramount to the respective liens of said defendants." (See record, page 21.)

The prayer of the petition is: "Wherefore plaintiff prays judgment against said defendant, The Davenport & S't Paul Railroad Company, for the amount of fifty-five thousand dollars, besides interest and costs of suit, and for the enforcement of a mechanic's lien for that amount upon said property, including the road-bed, track, depot-grounds and buildings, and all fixtures connected therewith; that said lien be declared paramount to the liens of the respective defendants, and that said defendants be foreclosed of and from all right of redemption from and after the sale thereof under execution issued upon said judgment, and that defendant have such other or further relief as may be equitable." (See record, page 21.)

The petition is verified by the president of plaintiff. (See record, page 21.)

Exhibit A, annexed to the petition, contains a statement and account for a mechanic's lien upon the portion of the Davenport & S't Paul Railroad situated in Delaware County, for work done and materials
200 furnished under the contract mentioned in the petition, and includes a full copy of the contract:

"This agreement, made and concluded this sixth day of August, one thousand eight hundred and seventy, between the Delaware Railroad Construction Company of the first part, and the Davenport & S't Paul Railroad Company of the second part, witnesseth:

"The aforesaid party of the first part, in consideration of the prices hereinafter agreed to be paid by the party of the second part, hereby covenants and agrees to grade and construct all of the line between the south and north line of Delaware County, of the Davenport & S't Paul Railroad, in such manner as shall conform in every respect to the annexed specifications, which shall be considered as part of this contract, and to the following conditions:"

(Here follow conditions as to the time and manner of performance of the work; then comes this clause:)

"In consideration of the faithful performance of all the conditions of this contract, the party of the second part agrees to pay said party of the first part on the estimates of the engineer, as follows:"

(Here follow the prices for the various kinds of work, and for the materials, and concludes thus:)

The prices above specified are to be in full compensation for all materials and labor required to put the same into the work herein contracted for, and complete the same in all respects as provided in this contract.

In order to enable the contractor to prosecute the work advantageously the said engineer shall make an estimate, from time to time, not oftener than once per month, as the work progresses, both on work done and materials delivered on the line of said railroad: The said party of the second part will pay, in current money, eighty per cent. of the amount of said estimate; twenty (20) per cent. of the estimates as they are
201 made to the party of the first part may be retained by the party of the second part, as damages in case of a forfeiture of this contract; which said twenty (20) per cent., together with the whole amount of this contract, according to the terms thereof, and on the estimate of the engineer, shall be paid to the party of the first part, within thirty days after all the work herein contracted for is completed and accepted by the engineer.

"Qualified below."

The above payments on estimates shall be made every thirty (30) days, at the office of the president of said Davenport & St. Paul Railroad Company, in Davenport.

The Davenport & St. Paul Railroad Company may stop all work at any time, without payment of damages, by giving thirty days' notice.

Whenever five consecutive miles of work from the south line of Delaware County are completed by the party of the first part, and accepted by the party of the second part, the party of the second part shall pay the full amount of the contract price for said work on said five miles, within thirty days after said work is accepted, without the deduction of said twenty per cent., and for every additional five consecutive miles of the south end of the work completed by said first party, said second party shall pay in like manner within thirty days after the same has been accepted, and so on through the county, from south to north.

Signed this 6th day of August, A. D. 1870.

R. EDDY, *President*,
J. M. BRAYTON, *Secretary*,
F. B. DOOLITTLE, *Treasurer*,
Board of Directors of the Delaware R. R. Construction Co.

All the money for the work hereinbefore specified, to be paid by the citizens of Delaware County.

H. PRICE,
President of Davenport & S't Paul R. R. Co.

202 In the statement for a mechanic's lien, after the contract, is a statement of account, showing the amount due plaintiff from the Railroad Company upon the contract to be $71,165.58.

The statement was sworn to and filed in the office of the clerk of the district court of Delaware County, on the 20th day of December, A. D. 1872. (See record, pages 26, 27 and 28.)

Exhibit B, annexed to the petition, contains the evidence showing that plaintiff and the Davenport & S't Paul Railroad Company, on the 5th of June, A. D. 1872, abrogated the clause at the end of said contract, containing these words:

"All the money for the work hereinbefore specified, to be paid by the citizens of Delaware County."

The consideration of this was that plaintiff should abate $2,000.00 of its claim on final settlement. (See record, pages 28, 29 and 30.)

The petition alleges a disagreement between plaintiff and the Davenport & S't Paul Railroad Company in relation to the construction of said contract, which was settled by a subsequent agreement to strike out these words. (See page 23 of petition, page 9 of record.)

Estimates of the engineer are contained in exhibits annexed to petition. (See record, from page 30 to 42 inclusive.)

On the 19th of January, A. D. 1874, plaintiff filed an amended petition, duly verified. (See record, pages 43, 44 and 45.)

On the 28th of January, A. D. 1874, the railroad company defendant filed a verified answer. (See record, pages 48, 49 and 50.)

203 On the 30th day of January, A. D. 1874, the plaintiff filed a reply to this answer. (See record, pages 51 and 52.)

On the 6th day of February, A. D. 1874, a decree was rendered against the defendant, the Davenport and S't Paul Railroad Company, establishing a mechanic's lien upon the portion of the road in Delaware County, in favor of plaintiff for the sum of $51,930.54 and costs of suit, the property being particularly described. A special execution was ordered against said property, and the cause was continued as to all defendants except the railroad company. (See record, pages 63, 64, 65, and 66.)

On the 7th day of April, 1874, plaintiff filed a supplemental petition. (See record, pages 67 and 68.)

On the 22d day of May, 1874, the decree was rendered against the defendants, Thomson and Dennison, trustees, declaring the mechanic's lien paramount to their claims and establishing it as against them. (See record, pages 80 and 81.)

On the 26th day of January, 1875, William Dennison filed a motion and bond for a retrial under the statute, having been served by publication. (See record, pages 81 and 82.)

On the 26th of January, 1875, William Dennison files his answer.

On the 26th of January, 1875, a retrial is granted to William Dennison by the court. (See record, pages 84 and 85.)

204 On the 2d of February, 1875, plaintiff files a motion to strike out answer of William Dennison for want of verification. (See record, pages 85 and 86.)

On the 17th day of May, 1875, the answer of William Dennison is stricken from the files. (See record, page 86.)

On the 19th of May, 1875, William Dennison files his first amended answer. (See record, pages 87, 88, and 89.)

On the 19th day of May, 1875, Lewis H. Meyer filed his application to be substituted as a codefendant in the cause. (See record, pages 89 and 90.)

On the 19th of May, 1875, Lewis H. Meyer and William Dennison filed what appellant calls petition to transfer to U. S. circuit court. This petition is entitled—

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
LEWIS H. MEYER AND WILLIAM DENNISON, trustees.

It alleges that the Delaware Railroad Construction Company and all intervenors are citizens of Iowa, and that Meyer is a citizen of New York, and Dennison of Ohio.

It alleges that by reason of prejudice or local influence, they will not be able to secure justice; that the cause can be determined in the U. S. circuit court for the district of Iowa; that the amount in controversy exceeds the sum of $500.00; asks the court to accept said petition and bond, and order the transfer to said circuit court.

The petition is not signed by any party, or an attorney. (See record, pages 91 and 92.)

205 On the 20th of May, 1875, was filed a bond to transfer to U. S. circuit court in penal sum of $1,000.00. The bond states that—

"Lewis H. Meyer and William Dennison have applied to the circuit court of said county to remove a certain cause pending in said court, wherein the Delaware Railroad Construction Company are plaintiffs, and the said Lewis H. Meyer, trustee, successor to John Edgar Thomson and William Dennison, trustees, and many others are defendants, from the said circuit court to the circuit court of the United States for the district of Iowa.

"Now, if said Meyer & Dennison shall enter in the said circuit court of the United States for the district of Iowa, on the first day of the next term thereof, a copy of the record of said suit, and shall pay all the costs that may accrue or be awarded by said circuit court, if it shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said circuit court in said suit, if special bail was originally required therein, then this obligation shall be void, otherwise in full force.

"WILLIAM DENNISON
and L. H. MEYER,
"*Trustees.*
"By GRANT & SMITH,
"*Their Attorneys.*

"C. WHITTAKER,
"JOHN E. HENRY,
"*Sureties.*"

(See record, pages 92 and 93.)

On the 20th day of May, 1875, William Dennison filed an affidavit and motion for continuance. (See record, pages 94, 95 and 96.)

On the 20th day of May, 1875, the first amended answer of William Dennison was on motion stricken from the files, and motion for continuance overruled. (See record, pages 96 and 97.)

206 On the 20th day of May, A. D. 1875, William Dennison filed his second amended answer. This answer contains no denial of any of the allegations of the petitions of plaintiff.

It alleges that the Davenport & S't Paul Railroad Company, on the 1st day of July, 1871, executed to John Edgar Thomson and William Dennison, a mortgage or deed in trust, conveying to them all the railroad and all the property of said company to secure certain bonds, of which over three million dollars have been issued, and are held by bona fide owners, and were so owned on the 22d day of May, 1874.

That said mortgage was duly recorded in the office of the recorder of Delaware County on the 7th day of February, A. D. 1872.

That the Delaware Railroad Construction Co. had constructive notice from that day, and actual notice thereof from the day of its execution, to wit, July 1st, 1871.

It alleges that plaintiff performed the work, furnished the materials, and makes the claim of lien against said company and said trustee by reason of a contract set out in the petition, to which reference is made:

That by said contract said Construction Company agreed that the work done and materials furnished under said contract should be paid by the citizens of Delaware County. And afterwards, on the first day of July, 1872, after said mortgage had been recorded in Delaware County, said Davenport & S't Paul R. R. Co. agreed with said Delaware R. R. Construction Co., in consideration of the reduction of the price of the contract two thousand dollars, to waive its right to have the work done under said contract to be paid for by the citizens of Delaware County, and to allow said Delaware Railroad Construction Co. to look to said Davenport & S't Paul Railroad Co. as the payee.

207 And by reason of said premises, said Delaware Railroad Construction Co. is not entitled to any lien upon said railroad, or any part thereof as against this defendant and the bondholders he represents.

(Signed) W'M DENNISON,
By GRANT & SMITH,
and L. M. FISHER,
His Attorneys.

(See record, pages 97, 98, and 99.)

On the 21st day of May, 1875, was filed a paper called an affidavit of L. M. Fisher. (See record, pages 99 and 100.)

The certificate was affixed to this after the trial and final disposition of the case. (See record, page 100; certificate of clerk in note; also clerk's certificate on pages 118 and 119 of record.)

On the 21st day of May, 1875, the trial commenced, and the court refused application of Lewis H. Meyer to be made a co-defendant. No exception was taken to this by Dennison.

Trial commenced. Plaintiff introduced in evidence the contract described in petition. Dennison then moved for a transfer to U. S. circuit court, which was refused, and the parties tried the cause. During the trial the defendant Dennison filed an amendment to his answer and plaintiff filed a reply.

At the close of the trial the parties agreed that the court might take the case under advisement, and upon filing his decision, judgment and decree should be entered as of the last day of the May term of court. (See record, pages 107 and 108.)

Under the decision decree was rendered declaring plaintiff's lien paramount to that of Dennison, trustee, confirming the former decree of the

court and established the lien as asked in petition. (See record, page 109.)

208 On the 5th of July, 1875, was filed the following, being the only notice of appeal.

Circuit court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT & ST. PAUL R. R. CO., AND others. } No. 1141.

To the above named plaintiff or J. M. Brayton, its attorney, and J. B. Satterlee, clerk of said court:

You are hereby notified that William Dennison, trustee, a defendant in said cause, has appealed from the judgment and decree of the said circuit court of Delaware county, rendered in favor of the said plaintiff on the 22d day of May, A. D. 1875, to the supreme court of the State of Iowa, and that said appeal will come on for hearing and trial, at the regular term of said supreme court, to be held at Dubuque, Iowa, commencing on the third (3) Monday in October, A. D. 1875.

GRANT & SMITH,
and L. M. FISHER,
Att'ys for Defts.

Service admitted by clerk, June 30, 1875. Notice served on plaintiff's attorney, June 30, 1875.

(See record, pages 109 and 110.)

The cause was tried upon documentary and oral evidence introduced at the trial.

The original evidence is not certified to this court.

No motion was made for a trial upon written evidence. See certificate of clerk, corrected record, pages 8 and 9.

No motion for a new trial was made, after the trial of May, 1875.

No bill of exceptions was filed.

209 The oral evidence in the record was written out and filed after the appeal to the supreme court, under date of July 17, 1875. (See certificate of reporter, page 133 of original record, and certificate of clerk, page 9 of corrected record.)

The original mortgage in controversy was not introduced in evidence. The record of it was read under plaintiff's objection. (See Record, pages 119 and 120.)

The Davenport & S't Paul Railroad Company was incorporated under the laws of Iowa, on the 27th day of May, 1868, with its office and principal place of business at Delhi, Delaware County, Iowa. (See articles 5 and 13, on pages 134 and 135 of Record.)

The authorized capital stock was three millions of dollars. (See article 7, page 134 of Record.)

No article changing the place of business or the amount of capital stock, or in any manner changing the original articles, was recorded in Delaware County. (See Record, page 128.)

No evidence was offered to prove death of Thomson, or the appointment of Meyer as trustee.

No evidence that plaintiff had actual notice of the mortgage in controversy or of its contents.

No evidence was introduced to show that any bonds were issued under the mortgage.

No evidence was introduced to show that plaintiff knew of the execution of any of the mortgages.

The subscriptions to stock of the railroad company in Delaware County were collected by B. F. Doolittle, as assistant treasurer of the Davenport & S't Paul Railroad Company, and disbursed under the direction of the president and executive committee of said railroad company. (See evidence of Doolittle, Record, pages 130 and 131.)

210 At the sale of the railroad, on the 4th of May, 1874, the property was purchased for less than the judgment, interest, and costs. (See execution and sheriff's return, on pages 73 to 77, inclusive, of Record.)

No petition or bond was filed for the removal of this cause to the U. S. circuit court.

The transcript does not contain all of the evidence introduced upon the trial.

J. M. BRAYTON,
Attorney for Appellee.

211 An' on the 24th day of April, 1876, appears the following record entry:

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT AND S'T PAUL RAILROAD Company et al., appellants.

On this day this cause is submitted to the court on printed argument of counsel.

And on the 16th day of June, 1876, appears the following record entry:

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT & S'T PAUL RAILROAD Company et al., appellants.

In this cause the court, being fully advised in the premises, filed their written opinion affirming the judgment of the circuit court. It is
212 therefore considered by the court that the judgment of the court below be, and it hereby is, affirmed, and that a writ of procedendo issue accordingly. It is further considered by the court that the appellants pay the costs of this appeal, taxed at $, and that execution issue therefor.

213 Supreme court, June term, 1876.

THE DELAWARE RAILROAD CONSTRUCTION CO.
vs.
DAVENPORT AND S'T PAUL RAILWAY COMPANY et al., appellants.

Appeal from Delaware circuit court.

This action was originally brought to recover for work and labor per-

formed by the plaintiff under an agreement in writing, whereby the plaintiff undertook to grade and construct all of the road of defendant between the south and north line of Delaware County, in accordance with certain specifications which were annexed to and made a part of the contract. The petition, in addition to asking for a judgment, prayed the establishment of a mechanic's lien on so much of said road as is situated in said county. John Edgar Thompson and William Dennison, trustees for certain bondholders, were made defendants, and the petition stated said Thompson and Dennison, as such trustees, had liens
214 on said property, but that the lien of the plaintiff was paramount thereto. No notice of the pendency of the action was served on either Thompson or Dennison. There was a trial as to the railway company, and judgment for upwards of fifty thousand dollars rendered in favor of the plaintiff, and the same established as a mechanic's lien on said premises from the 29th day of September, 1870. This judgment and decree was rendered on the 6th day of February, 1874. On the 7th day of April following, a supplemental petition was filed, asking that the right of redemption be foreclosed as to said Thompson and Dennison, trustees as aforesaid, and that the lien of said judgment be declared paramount to the lien of the trustees, as aforesaid. There was a service of notice on Thompson and Dennison by publication, the last publication being April 30th, 1874.

On the 17th day of February, 1874, an execution was issued on said judgment, by virtue of which the premises, consisting of the line of railroad in Delaware County, was, on the 4th day of May, 1874, sold by the sheriff to R. Eddy, for the use and benefit of plaintiff, and a certificate of such purchase was given him by the sheriff. At the May term,
215 1874, a decree was rendered against Thompson and Dennison, as prayed for in the supplemental petition, and at the January term, 1875, Dennison appeared and moved the court for a retrial of said cause, which being granted, he filed an answer, and there was a continuance of the action. At the May term, 1875, the answer of Dennison was stricken from the files, and on the 19th day of May an amended answer was filed, and on the same day Lewis H. Meyer asked to be substituted as a co-defendant, because, as he alleged in his petition, said Thompson deceased, and he had been chosen as trustee in his place and stead by the bondholders in accordance with a provision contained in the mortgage. And on the same day Meyer and Dennison united in and filed what is claimed to be a petition asking a transfer of the action to the circuit court of the United States. On the succeeding day, a bond, as provided in the act of Congress, was filed by them.

On the 20th day of May the amended answer of Dennison was stricken from the files, and a motion made by him for a continuance overruled. No complaint is made of the action of the court in either respect.
216 On the day last mentioned Dennison filed an amended answer. The court refused to permit Meyer to become a defendant, for the reason that no sufficient evidence of his appointment as trustee had been produced. The application of Meyer and Dennison to transfer the action was overruled. On May 21st a reply to the amended answer of Dennison was filed. The trial commenced, and after the plaintiff had offered the contract between it and the railway company in evidence, the defendant, Dennison, asked leave to file an amended petition and bond for a transfer of the action to the circuit court of the United States, which was denied, and after the trial had proceeded some time, and it is believed on the 22nd day of May, defendant moved to discontinue fur-

ther proceedings and transfer the cause to said circuit court, which was refused.

The court found for the plaintiff, and entered a decree in conformity to the prayer of the supplemental petition, and the defendant, Dennison, appeals.

J. M. BRAYTON,
For Plaintiff.
GRANT AND SMITH AND
L. M. FISHER,
For Defendant.

217 SEEVERS, Ch. J.:

I. It is insisted the State court lost jurisdiction of the action at the time the petition and bond of Meyer and Dennison was filed seeking a transfer of the action to the circuit court of the United States.

The transfer was sought under the act of Congress, approved Mar. 3rd, 1875, and the petition was based on the alleged fact that Meyer and Dennison were citizens [of] some other State than Iowa. The bond purported to have been signed by Meyer and Dennison as principals, and certain persons as their sureties. The petition was not verified and there was no evidence, by affidavit or otherwise, presented to the court tending to support the allegations in the petition that Meyer and Dennison, or either of them were citizens of some State other than that of Iowa. In the absence of any decission of the Supreme Court of the United States we are unwilling to hold that merely filing a petition and bond operates as a removal of the action, or rather ousts the State court of jurisdiction. The mischief that will inevitably follow such a ruling is a strong argument against it. Parties seeking to obtain time,
218 who are citizens of the State of Iowa, could present their unverified petition and bond and the State court would be powerless to prevent a removal of the cause. It does not seem reasonable that Congress intended to thus bind hand and foot the State court. The only penalty for the wrongful transfer is that the cause may be dismissed or remanded by the circuit court of the United States to the State court, and such order made as to costs as seems just. Such order dismissing or remanding the cause is reviewable by the Supreme Court of the United States on writ of error or by appeal. In view of the acknowledged fact that causes taken to the Supreme Court of the United States are not reached for trial under two or three years after the writ of error is sued out or appeal taken. It therefore becomes a serious matter whether this right of removal is practically within the uncontrolable power of a party to an action. The act of Congress provides that the circuit court of the United States to which any cause is removable "shall have power to issue a writ of certiorari to the State court commanding said State court to make a return of the record in any such cause removed
219 as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law."

This power given the circuit court would seem to be ample and all-sufficient to protect the party seeking to transfer a cause, which is wrongfully refused by the State court. But such circuit court cannot protect a party against whom a wrongful removal is made, because of the appeal to the Supreme Court of the United States.

The act of Congress further provides that the petition and bond may be filed in vacation of the State court; hence it is insisted as the State court is not in session and cannot pass upon the sufficiency of the peti-

tion and bond, the same, whether sufficient or not, immediately upon being filed ousts the State court of jurisdiction; but does this necessarily follow? Suppose the petition does not show the citizenship of the party, or if it does no proof whatever accompanies it, or that the bond is not conditioned according to law, or the sureties are men of straw; and suppose the further fact to exist that the party seeking the transfer is a citizen of the State of Iowa, can it be possible the
220 State court is deprived of jurisdiction by simply filing the petition and bond, and that the Supreme Court of the United States must determine the question of jurisdiction in each particular case before it can be regarded as authoritatively settled? If the power exists in the State court to determine the question of citizenship, or the sufficiency of the petition or bond in any case, it follows that it may do so in all cases, because the question is one of power or right and not as to the extent of such power or right.

As no proof was offered in any way or manner showing or even tending to show the citizenship of Meyer and Dennison, the court below did not err in retaining jurisdiction and proceeding with the trial. There is nothing in Freeman vs. Howe (24 How., 450) that conflicts with the views herein expressed. After the commencement of the trial the defendant asked leave to file an amended petition and bond for the removal of the cause to the Federal court. We incline to the opinion that such amended petition and bond could have been filed as a matter of right if exercised at the proper time. There was, therefore, no necessity to ask leave of the court. The act of Congress, however,
221 provides that the petition and bond must be filed before the trial of the cause, and this must mean before the trial begins. Certainly it was not intended a party could take the chances in the State court, and finding just before or even after the jury had retired to consider their verdict, that he probably would be beaten, or because his mind had changed at some time during the trial by reason of some adverse ruling of the court, as to where he prefers a trial, that he could then file the petition and bond and have the cause transferred.

If a sufficient petition and bond had been presented and filed at the time leave was asked to do so, we are of the opinion it would have been too late.

II. As we understand the abstract no exception was taken to the ruling of the court on the application of Meyer to be made co-defendant, and Dennison alone appeals; it is therefore very doubtful whether we can review the action of the court below in this respect.

Be this however as it may, it is clearly disclosed if Myer had any interest at all it was in the capacity of co-trustee with Dennison, and his answer and defense filed in the court below is identical with that of Dennison, whose answer remained on file and as to whom there was
222 a trial on the merits. It is therefore clearly apparent there was no prejudic'al error in the action of the court below in this respect.

III. Having obtained judgment and the establishment of a mechanic's lien against the principal defendant, the plaintiff caused an execution to issue and the premises were sold thereunder and purchased by the plaintiff, and this it is claimed amounts to an extinguishment of the lien, satisfaction of the judgment or merger of lien into the legal title. The lien of the plaintiff, if valid against the defendant, is prior to the lien of the mortgage under which defendant claims. The general rule is, if the mortgage' purchases the equity of redemption from the mortgagor, the mortgage as well as the debt will be extinguished. If, however, it was the intention or to the interest of the mortgagee to keep the lien alive,

the general rule does not apply. Ordinarily nothing but payment of the debt or an express release will operate to discharge the lien. Vanice vs. Bergin, 16 Iowa, 555. Washburne on Real Property, 611–612. The defendant was made a party to the original petition, priority of the lien of plaintiff asserted therein, and that be so established was prayed in the petition. But the decree rendered being ineffectual against the
223 defendant because he was not served with notice, the plaintiff filed a supplemental petition asking that defendant's right of redemption be foreclosed and forever barred. This petition was filed before the plaintiff purchased the premises at sheriff's sale. A notice was published notifying defendants of this proceeding, and subsequently a decree was rendered granting the relief asked. These facts show very conclusively that it was not the intention to merge or satisfy the lien. In fact all the circumstances satisfactorily show precisely the reverse, and it very clearly appears that it was not to the interest of the plaintiff the lien should be extinguished by the purchase and sale. There is no distinction in this respect between the lien of the mortgagee and that of the mechanic. Shields vs. Keys, 14 Iowa, 298.

A court of equity will keep an encumbrance alive or consider it extinguished, as will best subserve the ends of justice. Barnes vs. Carnack, 1 Barb., 392, and authorities cited.

We have examined the case of the State of Iowa vs. Lake, 17 Iowa, 215, and other authorities cited by counsel within our reach, and must confess our inability to their applicability in this case. We have
224 no hesitation, therefore, in holding that the purchase by the plaintiff at sheriff' sale did not amount to a satisfaction or extinguishment of the lien.

IV. The contract between the railway company and plaintiff provides upon performance by the latter the former agrees to pay the latter on the estimates of the engineer eighty per cent. of such estimates, the residue thereof to be retained until the contract was completed; the payment on the estimates to be made every thirty days. And then follows this language: "All the money for the work hereinbefore specified to be paid by the citizens of Delaware County." It is insisted this amounts to taking collateral security, and thereby the right to the lien has been forfeited.

It is shown that at the time the contract was made a large amount of money had been subscribed, and agreed to be paid, to the railway company by the citizens of such county; but there was no assignment of or setting apart other than that above stated of such subscriptions to the defendant. At most, the agreement was to pay out of a particular fund, and this does not amount to an equitable assignment of the subscriptions. (Christmus vs. Russell, 14 Wall., 84.) In Mervin vs. Shen-
225 nan, 9 Iowa, 331, it is said by Wright, Ch. J.: "A party who takes collateral security on the same contract is not entitled to a mechanic's lien. This means either a separate obligation attached to the contract named to guaranty its performance, or it may be the transfer of property or of other contracts to insure the performance of the principal agreement." (See, also, Phillips on Mechanics' Liens, secs. 282–285.) We feel entirely satisfied that the plaintiff did not take collateral security, and is not, therefore, deprived of the lien.

V. The contract under which the plaintiff claims a mechanic's lien was executed on the 6th day of August, 1870, and work thereunder commenced on the 29th day of September thereafter, and the work contracted to be done completed in December, 1872. On the first day of July, 1871, work under the contract to the value of upwards of fifty

thousand dollars had been done. And on said day the railway company executed the mortgage under which the defendant claims. For the purposes of this case the mortgage will be regarded as recorded on the day of its execution. There was no abandonment or cessa-
226 tion of the work undertaken by the plaintiff until its completion.

The question for determination is, which of these parties has the prior lien? Sec. 3139 of the code provides that the lien of the mechanic shall have priority over all other liens or encumbrances made subsequent to the commencement of the building, erection, or improvement. This case is clearly distinguishable from Nelson vs. Iowa Eastern R. R., now pending before us on petition for a hearing. And in Getchell vs. Allen, 34 Iowa, 559, the mortgage was executed and recorded prior to the materials for which the lien was sought being furnished. The facts in this case, however, are in a legal sense identical with those in Jones vs. Swan and Co. (21 Iowa, 181.) It was held in that case that the lien of the mechanic "attaches and is preferred to all other liens and encumbrances which become such subsequent to the commencement of the building, erection, and improvement." The contract is treated as entire, and the items being furnished thereunder, where there is a continuous open current account, the cause of action shall be denied to have accrued as to all on the date of the last item. And so the
227 mechanic's lien attaches at the commencement of his work, and the ninety days for notice commences on the date when all the work or things are furnished or performed. With this ruling we are entirely content, believing the true and correct rule applicable to the facts in this case is therein enunciated.

The lien of the plaintiff is prior and superior to that of the defendant.

Having thus noticed all the questions pressed in argument by appellant, it only remains for us to announce the *the* judgment of the circuit court must be affirmed.

228 I, E. J. Holmes, clerk of the supreme court of Iowa, do hereby certify that the foregoing pages contain a full, true, and complete copy of the opinion of said court in the case of Del. R. R. Const. Co. vs. Dav. and S't P. R'y Co., as full, true, and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court this 29th day of June, A. D. 1877.

[SEAL.] E. J. HOLMES, *Clerk.*

229 And on the 19th day of Sept., 1876, appears the following record entry:

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT & S'T PAUL RAILROAD Company et al., appellants.

On this day this cause is submitted to the court on appellants' petition for rehearing.

And on the 5th day of Oct., 1876, appears the following record entry:

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT & S'T PAUL RAILROAD Company et al., appellants.

In this cause the court, being fully advised in the premises, grant the appellants' petition for rehearing, and order arguments to be filed in print on or before the first day of the December term of this court.

230 And on the 5th day of Dec., 1876, appears the following record entry:

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT & S'T PAUL RAILROAD Company et al., appellants.

On this day this cause is again submitted to the court, on arguments of parties, a rehearing having been heretofore granted.

And now on this 7th day of June, 1877, appears the following record entry:

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT & S'T PAUL RAILROAD Company et al., appellants.

On this day the court, being fully advised in the premises, file their written opinion (on rehearing) adhering to their former opinion,
231 and affirming the judgment of the court below.

Supreme court of Iowa, June term, 1877.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT & S'T PAUL RAILROAD Co. et al., appellants.

DAY, C'h J.:

Upon the petition of appellant, a rehearing was granted in this case. The case has been reargued upon both sides, and is now again finally submitted for determination.

I. It is claimed that the court is in error in stating in the former opinion that "there was no evidence, by affidavit or otherwise, presented to the court tending to support the allegations in the petition that Meyer and Dennison * * * * * were citizens of some State other than Iowa."

On the 6th day of April, 1874, the attorney of plaintiff filed an affidavit in the cause, stating "that personal service of original notice
232 in said suit cannot be made upon the defendants, John Edgar

Thomson and William Dennison, trustees of certain bondholders of said railroad within the State of Iowa, and they are non-residents of said State of Iowa." It is claimed that this affidavit furnished proof of a conclusive character that Meyer and Dennison were citizens of some other State than Iowa.

To this position there are several answers:

1. The affidavit relates to a time more than one year prior to the time of filing the petition for transfer, evidence that Dennison & Meyer were non-residents of Iowa on the 6th day of April, 1874, would not prove that they were such non-residents on the 19th day of May, 1875, when the petition for transfer was filed.

2. The affidavit merely states negatively that Meyer and Dennison do not reside in Iowa. It does not state affirmatively that they do reside in any other State of the United States. For aught that the affidavit shows they reside in some foreign country.

3. The affidavit says nothing of the citizenship of Meyer and Dennison. They are simply non-residents of Iowa, and therefore residents of some other State or country.

233 But residence and citizenship are not synonomous terms, and a petition to remove a cause to the Federal court which alleges that the parties reside in different States is insufficient. (Parker vs. Orman, 18 Howard, 137.)

II. Upon the main question discussed in the opinion respecting the right of a State court to inquire into the truth of the facts alleged in the petition for a change of forums, we deem it unnecessary to add to what has already been said. We are satisfied with the conclusion reached in the foregoing opinion, and shall adhere thereto until the question is determined adversely by the court of ultimate resort. Our view derives at least indirect support from Holden vs. Putnam, Fire Insurance Co. (46 N. Y., 1), and Railway Co. vs. Ramsey (22 Wallace, 322).

234 And on the 12th day of June, 1877, there was filed in the office of the clerk of the supreme court of Iowa a motion for writ of error, in words and figures following, to wit:

In the supreme court of the State of Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Company
vs.
THE DAVENPORT & S'T PAUL RAILROAD Company, W'm Dennison & Lewis H. Meyer, trustees.

Now come the said Lewis H. Meyer & W'm Dennison, trustee, and pray for a writ of error with a supersedeas from the judgment of the said supreme court of the State of Iowa to the Supreme Court of the United States, and assigns for error—

1st. That the said cause, before the rendition of the said decree in the State court, was transferred to the circuit court of the United States for the district of Iowa, and the State court had no authority under
235 the Constitution and laws of the United States to try said cause, and the decision was in favor of the validity of a State law against the Constitution and laws of the United States.

2d. That in the trial of said cause there was drawn in question the

validity of a statute or authority exercised under the laws of the United States, and the decision was against their validity.

3d. Because said decision impairs the obligation of a contract, and is against the Constitution of the United States.

4th. That the plaintiffs in error claimed a right under the Constitution and statutes of the United States, and the decision was against the right claimed by the plaintiffs.

LEWIS H. MEYER &
W'M DENNISON,
Trustees,
By JAMES GRANT,
Their Att'y.

Allowed on filing supercedeas bond, with sureties, to be approved by the chief justice of this court, in sum of $5,000.

JAMES G. DAY,
Ch. J. Sup. C't.

236 Also appears the following bond:

Know all men by these presents that we, Lewis H. Meyer and W'm Dennison, as principals, and John E. Henry, as surety, are held and firmly bound unto the Delaware Railroad Construction Company in the penal sum of five thousand dollars, to which payment well and truly to be made, we bind ourselves, and each of us. Given under our hands and seals this 12th day of June, 1877.

The condition of this obligation is this: Whereas said Lewis H. Meyer and W'm Dennison have sued out a writ of error to the Supreme Court of the United States from a judgment of the supreme court of the State of Iowa, in a cause therein pending, wherein said Meyer and Dennison are appellants, and said Delaware Railroad Construction Company is appellee, in favor of said appellee and against said Meyer and Dennison, shall prosecute their writ of error to effect, and if they fail to make good their plea, shall pay all damages and costs that may be adjudged
237 against them, this obligation to be void; otherwise to remain in full force and effect.

LEWIS H. MEYER,
W'M DENNISON,
JOHN E. HENRY,
By J. GRANT,
Att'y of Record.

Approved June 12th, 1877.

JAMES G. DAY,
Ch. J. S'p'e C'rt I'a.

238 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, between The Delaware Railroad Construction Company and Lewis H. Meyer and William Dennison, trustees, wherein was drawn in question the validity of a State law against the Constitution and laws of the

United States; (2nd), wherein was drawn in question the validity of a statute or authority exercised under the laws of the United States, the decision was against their validity; (3rd), because said decision impairs the obligation of a contract and is against the Constitution of the United States; (4th), wherein a right claimed under the Constitution and statutes of the United States, and the decision was against the right claimed, a manifest error has happened, to the great damage of the said Lewis H. Meyer & William Dennison, trustees, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceeding aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12 day of June, A. D. 1877.

[SEAL.] EDWARD R. MASON.
Clerk U S. C. C. District of Iowa.

Allowed.

JAMES G. DAY,
Chief Justice Supreme Court, State of Iowa.

(Indorsed:) Supreme court of the State of Iowa. The Delaware Railroad Construction Company vs. Lewis H. Meyer and William Dennison, trustees. Writ of error.

239 Also appears the following citation, with proof of service.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Delaware Railroad Construction Company:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States, to be holden at the Capitol, at Washington, D. C., on the second Monday in October next, 1877, pursuant to a writ of error from the Supreme Court of the United States, filed in the clerk's office of the supreme court of the State of Iowa, wherein the Davenport & S't Paul Railroad Company, & Lewis H. Meyer and W'm Dennison, trustees, are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against said Meyer & Dennison, trustees, plaintiff in error above mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

240 Witness the honorable James G. Day, chief justice supreme court of the State of Iowa, this 12th day of June, 1877.

(Signed). JAMES G. DAY,
Ch. J. Sup. C't, Iowa.

U. S. OF AMERICA,
District of Iowa, ss:

Due service upon me of the within citation is hereby admitted on this 13th day of June, 1877.

(Signed) J. M. BRAYTON,
Att'y for Delaware R. R. Construction Co.

Filed June 1[illegible], 1877.

E. J. HOLMES, *Clk.*

241 Supreme court of Iowa.

I, E. J. Holmes, clerk of the supreme court of Iowa, hereby certify the foregoing to be true copies of appellant's abstract, appellee's additional abstract, record submitting case, record affirming judgment of the court below, record submitting case on rehearing, record granting rehearing, and of submission of arguments; record adhering to former opinion, copies of opinions of court, motion for writ of error, bond, citation with return, and the original writ of error as true, full, and complete, as the same remain of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of Iowa, at my office in Des Moines, this second day of July, A. D. 1877.

[SEAL.] E. J. HOLMES,
Clerk of Supreme Court of Iowa.

(Indorsement on cover:) No. 849. Lewis H. Meyer & William Dennison, trustees, plaintiff in error, vs. The Delaware Railroad Construction Company. Iowa sup. court. Filed 10th October, 1877.